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IN THE

Supreme Court of the United States

OCTOBER TERM—1963

No. 910

DADE BROTHERS, INC. and
CHESAPEAKE INDUSTRIES, INC.,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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To The Honorable, Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Dade Brothers, Inc., and the Chesapeake Industries, Inc., petition that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled case, No. 135-59, filed December 13, 1963,——Ct. Cl.——, 325 F. 2d 239 (Ct. Cl. 1963).

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1255(1).

Questions Presented

1. Whether the United States Government is responsible under the doctrine of respondeat superior for the wrongful participation of Federal Officers in an intentional

tort committed while acting within the valid scope of their authority as government agents.

2. Whether a United States Government Contractor is entitled to reimbursement, pursuant to the "reimbursement" clause of a government contract, for the costs of a judgment arising out of its participation in an intentional tort with the authorization of and at the request of the federal government.

3. Does an improper application of the doctrine of either res judicata or collateral estoppel by an administrative agency and the Court of Claims relieve the Respondent United States of the duty to offer substantial evidence to rebut Petitioner's prima facie case.

Statement of the Case

On May 11, 1952, Petitioners, Dade Brothers, Inc. and Chesapeake Industries, Inc. (hereinafter "Petitioner") entered into a cost-plus-fixed-fee contract with the Respondent United States, acting through the Atlantic District Engineers, Corps of Engineers, Department of the Army (hereinafter sometimes "Respondent" or "United States"), pursuant to which Petitioner undertook to perform the stevedoring functions at Claremont Terminal, Jersey City, New Jersey (App. A6, A7)*, which terminal

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* The parties, by stipulation filed with the Court of Claims on February 28, 1961, stipulated that the entire record, including all exhibits, briefs and decisions in connection with the proceeding before the Corps of Engineers Claims and Appeals Board, was to be made part of the record in the Court of Claims:

> Citations to the official transcript of testimony before the Corps of Engineers Claims and Appeals Board are indicated by the prefix "T".
>
> Citations to the Exhibits found in the Brief for Petitioner before the Corps of Engineers Claims and Appeals Board are indicated by the prefix "Ex.".
>
> Citations to the Appendix to this Petition are indicated by the prefix "App.".

was defined by the United States as "a critical link in our overseas supply chain" during the Korean War (T. 48).

Petitioner was required under the contract to abide by the terms of a labor agreement with Marine Warehousemen's Local 1478, affiliated with the International Longshoremen's Association (hereinafter "ILA"). At the outset, Petitioner was derided and advised by Tony "Cheese" Marchitto and another officer of Local 1478 that if it expected to hire any labor at Claremont it would have to accept Augustine DeAcutis as hiring boss of the day shift, and Dominick Strollo as night hiring boss (T. 39, 40). Both men had criminal records, the latter being the brother of Anthony "Tony Bender" Strollo, an infamous member of the Cosa Nostra who is now missing and presumed dead (T. 49). It was common knowledge that the gangster-dominated ILA controlled hiring on the piers and any attempt to interfere with the "shape-up" system would precipitate a strike. Because a work stoppage would greatly endanger the "crash" program and the war effort, Petitioner was continually cautioned by Respondent not to interfere with the Union's hiring policy, regardless of the collective bargaining agreement (T. 59-60).

On the other hand, E. Traverton Clark, Petitioner's Executive Vice-President, made many unsuccessful attempts to correct the labor situation. For example, he went to Joe Ryan, the notorious leader of the ILA, asking for permission to fire DeAcutis because the longshoremen were dissatisfied with his leadership, but Ryan threatened to "shut the damn place down" if DeAcutis was fired (T. 144-145). Furthermore, both Clark and Colonel Tench, who was in charge of operations for the Respondent, wanted to but could not fire Strollo, the night hiring boss (T. 49). In fact, when the Jersey City Police held Strollo for questioning and otherwise attempted to prevent the New York gangsters from taking control of the piers, the

longshoremen caused a wildcat strike and refused to return to work until guaranteed that Strollo would stay on (T. 50). In addition, Clark eventually suggested that all longshoremen be investigated as to criminal background and fingerprinted or that an injunction be sought, but Colonel Tench and several Army Generals thought these suggestions inadvisable in view of the Respondent's "hands off" policy with regard to labor (T. 49-50, 77).

Despite many requests by Petitioner for help, particularly under the "inimical to the public interest" clause found in Article VII (1)(e) nothing was ever done by the United States to assist Petitioner in ridding the pier of gangsters. Article VII (1)(e) provides:

> "The Contracting Officer may require the Contractor to dismiss from work such employee or employees as the Contracting Officer deems incompetent, careless, or insubordinate or whose continued employment is deemed inimical by the Contracting Officer to the public interest." (App. A8)

Through daily job meetings, the United States was made fully aware of DeAcutis' hiring policy. However, Colonel Tench never invoked the "inimical" clause because having undesirables at Claremont was the "lesser of two evils" (T. 48, 51); nor did he or any other Government Officer ever advise Petitioner that they disapproved of DeAcutis and wanted immediate remedial action taken. Colonel Tench subsequently testified, as follows, before a Senate Subcommittee of the Committee on Interstate and Foreign Commerce (under the chairmanship of the late Senator Tobey) investigating the Claremont operations:

> "I believe, Mr. Rice, that the shape-up system is the source of the evil here; in other words, the

> operator on the New York waterfront does not have control of who is on the job. The Union dictates. As long as the Union has the power of dictation as to who works, the operator is bound to be at a disadvantage." (T. 59-59)

Furthermore, in his testimony Colonel Tench agreed with these remarks of Senator Tobey:

> "The fact remains: looking back over it in retrospect, here was a major operation for the safety of the country. Its ramifications extended overseas. That is what Dade was working on there, and under your surveillance and supervision. You realize that you had some human handicaps, men who were crooked, as shown by their records, and so forth, troublemakers, but while you would like to discharge them from the standpoint of efficiency, you had a fear, a sort of Damocles' sword hanging over you in the form of a labor Union, that if you did fire them you would bring down the wrath of the Labor Union and they would stop operations" (T. 59).

Finally, starting on June 24, 1952, an "insurgent" group of longshoremen began a series of "wildcat" strikes because of dissatisfaction with the Union leadership (T. 64-65). After the initial strike the Union refused to recognize the seniority status of the "insurgents" because of the unauthorized strikes (T. 110). The strikes led finally to an unsigned memorandum agreement on August 13, 1952, which provided, in substance, that pending arbitration, picket lines were to be withdrawn with a "Return of men to work immediately, with insurgent members to be absorbed as soon as possible" (Ex. 2). Between August 13, and September 22, 1952, when the Arbitrator rendered his decision, the insurgents were not hired according to seniority because the Union believed that the memo meant

they were to be hired only after the loyal men had been hired. The Arbitrator decided, in substance, that: because of the Union Charter, the Union could not properly deny the insurgents their seniority; the insurgents had no right to strike and thereby inflict economic injury on Petitioner; it was the Union and not Petitioner which wrongfully decided that the insurgents should be denied seniority (Ex. 33).

Starting on or about October 21, 1952, three suits were instituted in the Superior Court of New Jersey by fifty-four longshoremen against: Petitioner; Local 1478; three officers of Local 1478, Vincent "Cockeye" Brown, Tony Piscopo and Augie DeAcutis; and, Petitioner's project and labor relations managers (App. A10). The complaints sought compensatory and punitive damages "by reason of the malicious and unwarranted action" of the defendants in denying plaintiff's their seniority rights (App. A10, A11).

The United States Attorney's Office immediately entered appearances for all defendants and, in fact, undertook to defend the action. However, much later, as indicated in by letters from Respondent to Petitioner dated December 20, 1952 (Ex. 3), December 30, 1952 (Ex. 4) and January 21, 1953 (Ex. 6), the United States Attorney withdrew as counsel advising Petitioner that "it is imperative that immediate action be taken in this matter since there is now pending before the Court a motion for partial summary judgment which has been adjourned due to the substitution of counsel * * *" (Ex. 4). Petitioner, in accordance with the aforesaid directive, thereafter undertook the defense of the action believing that it would be reimbursed for all costs and expenses at the conclusion of the action.

The jury returned no verdict against the individual defendants, but found against both Local 1478 and Petitioner, rejecting the latter's contention that it was the innocent victim of an internal Union dispute. The Appel-

late Division affirmed the trial court and the Supreme Court affirmed both lower courts without opinion.

Petitioner did not attempt to prove and did not offer any evidence at the New Jersey Trial in support of the proposition that the United States knew of or was responsible for Petitioner's role at Claremont or that the United States was liable to Petitioner for reimbursement; thus, that issue was never before the New Jersey courts.

Since the Union had no funds Petitioner paid the total judgment and later sought reimbursement from the Respondent (the total sum sought in the Court of Claims was $115,137.74 which includes the judgment, costs and attorney's and accountant's fees) under the "reimbursement" clause, Article IV (1) (t) of the contract which provides:

> "In the event the Contracting Officer shall determine that the best interests of the Government require that the Contractor initiate or defend litigation in connection with claims of third parties arising out of the performance of this contract, the Contractor will proceed with such litigation in good faith and the cost and expense of such litigation, including judgments and court costs, allowances rendered or awarded in connection with suits for wages, overtime or salaries, and reasonable attorney's fees for private counsel when the Government does not furnish Government counsel, shall be reimbursable under this contract" (App. A7, A8).

By letter dated October 27, 1955, the Contracting Officer denied Petitioner's claim, holding that:

(a) the assessment of punitive damages against Petitioner in the New Jersey action determined that Petitioner committed a malicious tort;

(b) as a result thereof Petitioner violated Article 1(4), which provides: "The Contractor, upon the responsibility

of its corporate officers, shall (1) faithfully and diligently administer performance of this contract; (2) carefully recruit, furnish, supervise and maintain an adequate force of competent and dependable employees; * * * (5) do and perform all other administrative and managerial services reasonably required to perform, with diligence and dispatch, all obligations of this contract.";

(c) that the litigation in New Jersey "did not arise out of the faithful performance of the contract";

(d) the final determination of the court "conclusively establishes" that Petitioner violated the contract by failing to comply with the terms of the collective bargaining agreement (App. A28, A29, A30).

Petitioner appealed the Contracting Officer's decision to the Corps of Engineers Claims and Appeals Board (hereinafter "Board") before whom a three-day hearing was held. At the hearing, Petitioner produced three witnesses who denied Petitioner participation in the tort found by the New Jersey courts and testified, without contradiction that the United States through its officers and agents had knowledge of, approved and fostered the alleged unfair hiring practices of Local 1478. The United States offered no witnesses in defense of the action. The parties stipulated that two volumes of excerpts from the transcript of testimony at the New Jersey trial (T. 30-31) and portions of the transcript of testimony before the Senate Subcommittee (T. 46, *et seq.*) were to be deemed admitted in evidence. The transcript before the Senate Subcommittee conclusively proved that the United States through its Officers in charge, knew of the Union's hiring practices, but felt that it was in the public interest during the national emergency to overlook those practices on the ground that it was the "lesser of two evils" (T. 51).

The Board affirmed the Contracting Officer's decision holding that it was,

> "established by the New Jersey Courts that [Petitioner], as well as its Vice-President * * * and its Labor Relations Manager * * * was guilty of the tortious conduct of entering into a conspiracy with the defendant Union to deprive certain Union members of their seniority rights under the Union Agreement" (App. A32).

In point of fact, the trial court's "verdict was silent as to [the individual defendants]." Petitioner contended at the Board hearings that the Contracting Officer improperly applied the doctrine of collateral estoppel or res judicata, and that since the United States relied solely upon the New Jersey decisions, there was no substantial evidence to support a finding against Petitioner. The Board held that "the New Jersey decision is not in any formal sense res judicata", but proceeded to hold that as a matter of law the New Jersey decision was dispositive of the issue before it.

Petitioner's contention that it was entitled to reimbursement irrespective of the New Jersey decision was also rejected, the Board holding:

> "[A] contractor who commits a malicious and wilful tort in derogation of the contract provisions cannot be said to be in the commission of such tort acting within the framework of the contract within the meaning of Article IV(1)(t) aforequoted. In other words, the conspiracy cannot be considered as arising out of the performance of the contract * * *" (App. A33).

In addition, the Board stated that it was aware of decisions of the Comptroller General that a CPFF contractor is entitled to be reimbursed for damage or loss

occasioned by the negligence of an employee, but distinguished such cases on the ground that the instant case dealt with "wilful and malicious" conduct of "representatives of top management" and not "minor employees" (App. A33). Finally, and most importantly the Board rejected Petitioner's argument that the United States should be estopped to deny liability for reimbursement, holding that there was no evidence to show that the United States knew of the "existence of the conspiracy found by the New Jersey Courts" but, at most, only that the United States "knew generally of the labor conditions at the waterfront" (App. A34).

On appeal to the Army Contract Appeals Panel of the Armed Services Board of Contract Appeals, the Board's decision was affirmed on the ground that in "view of the confirmed judgment of the New Jersey Court" the acts which resulted in the New Jersey litigation were not committed while Petitioner was engaged in the faithful performance of the contract (App. A36).

Thereafter, Petitioner instituted the instant action in the Court of Claims, whose decision is found in the Appendix hereto at page A1 .

Reasons for Granting the Writ

The questions presented herein, concerning as they do the relations between the United States and those with whom it deals commercially, are of inestimable importance not only to Petitioner, but to all Government Contractors and unless this Court grants the petition herein so that it may clarify the rules concerning the responsibility of the United States for the acts and representations of its agents and interpret the "reimbursement" clause of all such Government Contracts in light of the facts herein, there will be a state of chaos and uncertainty with re-

gard to all corporations which enter into Government Contracts of this type.

1. The holding of the Court of Claims that the United States is not responsible for the wilful torts of its agents is in conflict with prior decisions of this Court.

2. This Court has not heretofore interpreted, and it is unlikely that there will ever be a conflict between courts of appeals as to the interpretation of, the words "performance of this contract" found in the "reimbursement" clause of Government Contracts because suits of this type against the United States arise generally only in the Court of Claims.

ARGUMENT

1.

The holding of the Court of Claims that the United States is not responsible for the wilful torts of its agents is in conflict with prior decisions of this Court.

A. The Court of Claims determined that the United States is somehow immunized against responsibility for the acts and representations of its agents where those acts and representations are eventually determined to be tortious. The basic premise adopted by the Court of Claims appears to be that the authority of its agents to make decisions is unlimited so long as the decisions made are right. This is in direct conflict with prior determinations made by this Court.

In *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 695 (1948), this Court said:

> "We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general

> law, if they would be regarded as the actions of a private principal under the normal rules of agency."

This Court there rejected the argument that "an officer given the power to make decisions is only given the power to make correct decisions" and held that his actions bind the United States, whether or not "based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so." *Larson* v. *Domestic & Foreign Corp., supra,* at 695.

The Respondent's agents herein collectively involved in the performance of the Claremont contract used their best judgment in granting the Union unfettered discretion with regard to hiring practice. However, merely because in the valid exercise of that judgment it later develops that the United States encouraged Petitioner to take a position ultimately determined to be tortious does not mean that such encouragement was without the scope of the agents' authority. While the collective determination of the federal agents may now be classified as "incorrect", the Respondent, nevertheless, remains bound to reimburse Petitioner for the costs and expenses of a judgment against the latter for its involvement in the commission of a wilful tort. The United States cannot adopt a double-standard, the scope of which is to be determined by hindsight; it cannot urge its contractors to high standards of performance because of emergency conditions generated by the Korean War, and later defend against a just claim on the ground that the very acts taken in response to government urging are tortious.

This Court has, in *Portsmouth Co.* v. *United States,* 260 U. S. 327, 330 (1922), previously recognized the severity of an ex post facto determination of the scope of an agent's authority. In that case, this Court said there was a "natural unwillingness to find lack of authority to

do the acts even if the possible legal consequences were unforeseen." Implicit in such language is the doctrine that the United States may not lightly disclaim liability for the acts of its agents on the mere ground that the legal consequences of the acts were unforeseeable when made. Such pronouncement is this Court's recognition that the sovereign, acting as it does only through agents, is not infallible or sacrosanct but is capable of making decisions which may ultimately cause harm to innocent third persons. Consequently, at least in the area of commercial activity, the sovereign must, as do all principals, observe the time-honored doctrine of respondeat superior. In the case before this Court it is conceivable that the United States could not foresee that by action or inaction where action was required, it would become guilty of foisting upon Petitioner the consequences of the Union's illegal hiring practices and thereby become responsible to Petitioner for the costs of the New Jersey judgment under the "reimbursement" clause of the contract. However, such lack of foresight does not suffice to protect the United States from the legal consequences of its action.

In *United States* v. *Moorman*, 338 U. S. 457, 560 (1949), this Court recognized the importance of the question of the authority of federal officers.

> "In petitioning for certiorari the Solicitor General represented that this decision plus previous ones of the Court of Claims had 'weakened and narrowed the effectiveness of the well-established policy of the Government to settle, without expensive litigation, disputes arising under its contracts'; and that the total effect of the decisions was to 'add further doubt and confusion to the authority of designated officers of the United States to make final decisions under government contracts'. We granted certiorari."

It is patently clear that the decision below, if allowed to stand without review by this Court, will "add further doubt and confusion to the authority of designated officers of the United States to make final decisions under government contracts", and unless that decision is clarified, Government Contractors will have imposed upon them the unconscionable burden of acting at their own peril in relying upon the acts and representations of agents of the United States.

B. The adoption by the Court of Claims of the holding of the Board that there was no evidence that the Respondent knew of the existence of the "conspiracy found by the New Jersey Courts" does not in any way weaken Petitioner's argument that the United States should be estopped to deny reimbursement. Examination of the entire record reveals that at the hearing before the Board, Petitioner introduced three witnesses who collectively testified without contradiction that Petitioner was not engaged in a conspiracy with the Union and, in any event, that whatever relationship existed between Petitioner and the Union was known to and approved by Respondent and existed between Petitioner and the United States to the same degree. On the other hand, the United States produced no witnesses, but introduced only excerpts from the transcript of the New Jersey trial testimony (T. 30), and the decision of the Appellate Division of New Jersey. Relying only on such insubstantial evidence and in complete disregard of Petitioner's evidence, the Board arbitrarily held that the United States had knowledge of the Union hiring policies but not of the existence of a "conspiracy" and, therefore, that Petitioner was not entitled to reimbursement. It is submitted that the Court of Claims improperly applied the doctrine of either res judicata or collateral estoppel to the determination of the courts of the State of

New Jersey, and, as a result thereof, the United States was allowed to prevail without offering substantial evidence to rebut Petitioner's prima facie case.

The fact is that the New Jersey litigation involved different issues between different parties and is in no way dispositive of the issues involved before the Board or Court of Claims. The New Jersey litigation, which established that Petitioner was a co-conspirator with the Union, has absolutely no relevance to the question whether the United States should be estopped to deny responsibility to Petitioner for reimbursement under the "reimbursement" clause of the contract. Clearly, whatever took place at Claremont Terminal with regard to labor, whether defined as a tortious conspiracy or intentional deprivation of seniority rights, the United States was well aware of it, approved of it and insisted on its continued existence for *the sake of the nation's security*. Although the Respondents' battle cry throughout has been that the *conspiracy found by the New Jersey court was unknown to the Respondent*, it cannot dispute the fact that it has never offered a "scintilla" of evidence to rebut the Petitioner's prima facie case.

Consequently, the decisions of the Board, and the Court of Claims which decided the case on a stipulation of facts, was arbitrary, whimsical and capricious and not supported by substantial evidence in addition to being in conflict with decisions of this Court; and, because of the importance to all Government Contractors of a resolution of this problem, this Court should grant the petition herein.

2.

This Court has not heretofore interpreted, and it is unlikely that there will ever be a conflict between courts of appeals as to the interpretation of, the words "performance of this contract" found in the "reimbursement" clause of Government Contracts because suits of this type against the United States arise generally only in the Court of Claims.

Since contract actions against the United States generally arise only in the Court of Claims, it is unlikely that there will ever be a conflict between courts of appeals as to the interpretation of the words "performance of this contract" found in the "reimbursement" clause of a government contract. Furthermore, this Court has never decided the important question whether the commission of an intentional tort under the circumstances of this case precludes reimbursement for a judgment on the ground that the tort does not arise in the "performance of the contract."

It is equally important to observe that in *United States* v. *Blair*, 321 U. S. 703, 731 (1944), this Court recognized the need for review of questions involving interpretation of government contracts:

> We granted certiorari because of important questions of interpretation of the government construction contract used in this case."

This clause at issue herein is Article IV(1)(t), which provides, in substance, that if the government determines that it is in its best interest to require the contractor to "defend litigation in connection with claims arising out of the performance of this contract", the contractor shall proceed to do so and the government shall reimburse the contractor for "the cost and expense of such litigation, including judgments and court costs".

The Court of Claims below held that such clause does not allow reimbursement for costs of a judgment arising out of an intentional tort. Such holding implies that if the Petitioner were successful on appeal to the Supreme Court of New Jersey, the United States would still not be liable under the "reimbursement" clause. And, reduced to its logical extreme, the holding means that the cost of a *successful* defense of a suit charging an intentional tort is not reimbursable, notwithstanding that the suit arises only because of the contractor's actions in the performance of the contract.

The point is, that the holdings below amount to a pronouncement that a suit for an intentional tort cannot arise out of the "performance of the contract" notwithstanding the outcome of the litigation; this is a preposterous conclusion and it is obvious that it was erroneously employed herein; i.e. the fact that Petitioner was found to have participated in a wilfull tort was erroneously held to be determinative of the question whether the tort grew out of the "performance of the contract".

It is thus abundantly clear that unless this Court gives its interpretation of the important words "performance of this contract" those business firms which deal with the United States will never be sure whether action taken by them at the instigatio of the United States will ultimately result in a breach of contract.

CONCLUSION

Because it is of overwhelming importance to both the United States and Government Contractors that they know both the extent of authority of government agents with whom such contractors deal in the performance of government contracts and the meaning of the vital "reimbursement" clause of such contracts, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JAMES A. CUDDIHY, ESQ.,
Counsel for Petitioner

APPENDIX

Opinion and Findings of the Court of Claims

IN THE

UNITED STATES COURT OF CLAIMS

No. 135-59

(Decided December 13, 1963)

DADE BROTHERS, INC., AND CHESAPEAKE INDUSTRIES, INC. v. THE UNITED STATES

James A. Cuddihy for the plaintiffs. *Havens, Wandless, Stitt & Tighe* of counsel.

Edward L. Metzler, with whom was *Assistant Attorney General John W. Douglas*, for the defendant. *Glenn E. Harris* was on the brief.

Before JONES, *Chief Judge*, WHITAKER, LARAMORE, DURFEE and DAVIS, *Judges*.

OPINION

PER CURIAM: A cost-plus-fixed-fee contractor sues the United States for reimbursement of expenses and costs incident to three companion suits brought in the New Jersey state courts against the contractor by some of its employees.[1] These suits charged the contractor (and

[1] Plaintiff Dade Brothers, Inc. is the government contractor and the employer which was sued. Plaintiff Chesapeake Industries, Inc. is the parent of Dade Brothers; it took an assignment of all of the latter's right, as asserted in the present action, against the defendant.

certain of its officials and employees) with conspiracy with a union and union officials to deprive the suing employees of seniority rights and employment to which they were entitled. After a jury trial in the Superior Court of New Jersey,[2] a verdict was rendered against the contractor and substantial judgments were entered. The Appellate Division of the Superior Court affirmed the judgments in an opinion which declared that "there was ample proof to warrant a finding by the jury that the employer [*i.e.*, the contractor] and the union acted in concert in wilfully and maliciously interfering with plaintiffs' right to employment under the collective bargaining agreement." The Supreme Court of New Jersey affirmed without opinion.

Dade Brothers' contract with the Government provided that, if the Contracting Officer determined that the contractor should defend "litigation in connection with claims of third parties arising out of the performance of the contract," the contractor would be entitled to reimbursement of "the cost and expense of such litigation, including judgments and court costs, allowances rendered or awarded in connection with suits for wages, overtime or salaries, and reasonable attorney's fees for private counsel * * *." Relying on this provision, the contractor applied for reimbursement of the amounts of the judgments paid the employees and the litigation expenses and costs incurred in the New Jersey suits. The Contracting Officer disallowed any reimbursement because the contractor had violated its obligations under its contract with United States by engaging in the conspiracy found by the state courts; therefore, he held, the New Jersey litigation did not arise

[2] The three cases were consolidated and tried together.

out of the proper performance by the contractor of its contract with the Government (within the meaning of the litigation-reimbursement clause). This adverse determination was affirmed by the Claims and Appeals Board of the Corps of Engineers and by the Armed Services Board of Contract Appeals. The present action was then begun.

At an earlier stage of this case, the parties entered into a stipulation of facts and on the basis of that stipulation presented to the court the issue of the defendant's liability. After briefing and oral argument, the court ordered the case referred to a trial commissioner "for further proceedings limited to the question whether or not the decision of the Armed Services Board of Contract Appeals was arbitrary, capricious or unsupported by substantial evidence." The trial commissioner has made his findings of fact on the basis of the parties' stipulation and exhibits, including the record before the appeal boards within the Department of Defense; no oral testimony was offered in this court. The commissioner has concluded that "the entire record of the case does not establish that the decision of the Armed Services Board of Contract Appeals was arbitrary, capricious, or unsupported by substantial evidence." New briefs have been presented, and the case has again been argued orally.

We agree with the trial commissioner's subsidiary findings and also with his conclusory finding that the determination of the Board of Contract Appeals was adequately supported. The Board had before it the results of and proceedings in the New Jersey litigation. It also had before it the oral testimony of the contractor's officer (before the Engineers Claims and Appeal Board) denying the con-

spiracy and wrongdoing found by the New Jersey courts. Certainly, the Board of Contract Appeals was entitled to accord great weight, as it did, to the judgments of the New Jersey courts; but we do not read the Board as holding itself *bound* by those state court judgments—either on the basis of collateral estoppel or any other doctrine. Rather, the Board decided, on the basis of everything before it including the judgments, that the contractor had failed to show (a) that the New Jersey judgments were erroneous, (b) that it had not breached the union agreement and the government contract, or (c) that the acts resulting in the New Jersey litigation were committed by the contractor in the faithful performance of the government contract. We hold that the Board was free to reach these conclusions and was not required, on the record before it, to decide in the contractor's favor.

Once the Board's determinations are accepted, and we do accept them, there is no ground for recovery against the Government. Neither the wording nor the policy of the litigation-reimbursement article of the government contract authorizes reimbursement of expenses incurred because the contractor breached its agreement with the Government or failed to perform that contract faithfully. Nor can we accept plaintiffs' argument that the clause automatically becomes applicable whenever the Contracting Officer asks the contractor to defend litigation brought by third parties. In litigation like that instituted against the contractor here, the Government cannot tell whether its contract has been breached until the conclusion of the case; it is not required to make that determination at the outset before the merits of the matter are known. In this

case, the Contracting Officer made it clear to the contractor, from the beginning, that the issue of reimbursement would be decided subsequently and that reimbursement would not be a matter of course. See findings 13-16, 18-19, 21. Finally, plaintiffs charge that the defendant's representatives approved and participated in the conspiracy between Dade Brothers, Inc. and the union. But the Engineers Claims and Appeals Board specifically found that there was no evidence that the Contracting Officer was aware of or had reason to be aware of the existence of the conspiracy found by the New Jersey courts; there is no indication that this finding was rejected or disapproved by the Board of Contract Appeals and we see no reason why it should have been. In any event, wrongful participation by government officials in a tortious conspiracy such as was found here would put them far ouside their authority to represent the United States with respect to this contract. Under established principles, the United States would not be liable under the contract for such wrongful acts of officials exceeding their authority.

The petition is dismissed.

Opinion and Findings of the Court of Claims

COURT OF CLAIMS FINDINGS OF FACT

The court, having considered the evidence, the stipulation and exhibits, the report of Trial Commissioner Richard Arens, and the briefs and arguments of counsel, makes findings of fact as follows:

1. (a) Plaintiff, Dade Brothers, Inc. (hereinafter sometimes referred to as "Dade"), is and was at all pertinent times a corporation organized and existing under the laws of the State of New York, with its principal office in New York City.

(b) Plaintiff, Chesapeake Industries, Inc., is and was at all pertinent times a corporation duly organized and existing under the laws of the State of Ohio, with its principal office in New York City. Since May 15, 1952, it has owned all of the outstanding capital stock of plaintiff, Dade Brothers, Inc. About September 29, 1955, plaintiff Chesapeake Industries, Inc., paid $30,000 as guarantor of a supersedeas bond executed by plaintiff Dade Brothers, Inc., and received from the latter an assignment of all of its rights against the defendant as asserted in the present action. In August 1959 plaintiff Chesapeake Industries, Inc., became known as the America Corporation.

2. Under date of May 11, 1952, Dade executed a cost-plus-fixed-fee contract (hereinafter referred to as "the contract") with defendant, acting through the Atlantic District Engineers, Corps of Engineers, Department of the Army. The contract provided for the performance by plaintiffs of terminal or processing services, including the packaging of machinery, airplane parts, bulldozers, heavy and light hardware, and allied items for transportation

to bases in Morocco, North Africa, and Greenland. The contract provided for a fixed fee of $288,000 and an estimated operating and service cost, exclusive of fixed fee, of $16,290.

3. The contract provided in pertinent parts as follows:

ARTICLE I. STATEMENT OF WORK.

1. The Contractor shall, during the calendar year 1952, furnish all labor, material, equipment, supplies and accessorial services not furnished by the Government, and do all matters and things necessary to receive, unload, reload, identify, dismantle, mark, warehouse, store, guard, preserve, pack, stencil, process for export shipment, and deliver to dock alongside steamer or aboard scow or lighter with transportation thereof to piers in the New York metropolitan area, all construction equipment, materials and supplies, which the Government or its contractors may tender, f.o.b. land or water carrier, to the Contractor at Claremont Terminal, Jersey City, N. J., for shipment to overseas projects under the jurisdiction of the Corps of Engineers, Department of the Army. * * *

* * * * *

ARTICLE IV. COST OF THE WORK.

1. *Reimbursement for Contractor's Expenditures*: * * *

* * * * *

t. In the event the Contracting Officer shall determine that the best interests of the Government require that the Contractor initiate or defend litigation in connection with claims of third parties arising out of the performance of this contract, the

Contractor will proceed with such litigation in good faith and the cost and expense of such litigation, including judgments and court costs, allowances rendered or awarded in connection with suits for wages, overtime or salaries, and reasonable attorney's fees for private counsel when the Government does not furnish Government counsel, shall be reimbursable under this contract.

* * * * * *

ARTICLE VII. SPECIAL REIMBURSEMENTS.

* * * * * *

e. The Contracting Officer may require the Contractor to dismiss from work such employee or employees as the Contracting Officer deems incompetent, careless, or insubordinate or whose continued employment is deemed inimical by the Contracting Officer to the public interest. * * *

4. As provided for therein, the contract was terminated for the convenience of defendant by notice dated September 24, 1952, effective October 31, 1952. Pursuant to a termination agreement between the contracting parties dated December 10, 1954, defendant paid Dade a fixed fee of $256,673. The termination agreement was by its terms specifically limited to a determination of the proportion of the fixed fee which was to be payable to Dade by defendant. The agreement further specifically provided that Dade would continue to be entitled to reimbursement of such costs as were allowable or payable under the applicable provisions of the terminated contract.

5. In the performance of the contract during the period before its termination, and incident thereto, Dade necessarily employed various crafts of laborers, including warehousemen, longshoremen, packers, checkers, and teamsters. The provisions of the contract required Dade in the performance thereof to abide by all the terms and conditions of a union agreement with the Marine Warehousemen's Local affiliated with the International Longshoremen's Association covering warehouse employees.

6. The agreement entered into between Dade and Marine Warehousemen's Local No. 1478 on December 1, 1951, which was in effect during the performance of the contract, contained among other provisions the following:

> • • • Employees shaping regularly for each company shall be entitled to employment in work for which they have the necessary qualifications in order of the seniority with the company. Employees voluntarily leaving or discharged from the company's employ shall forfeit all claims to seniority previously established. Employees failing to shape for a period of two months shall be deemed to have voluntarily left the employ of the company. In computing total length of service, leaves of absence authorized by the company and temporary transfers to positions not covered hereby, shall be considered as time served.
>
> • • • • •
>
> Each employee shall be entitled to one week's vacation with pay if he has worked at least 700 hours and two weeks' vacation with pay if he has worked at least 1200 hours, during the year ending September 30th. One week's vacation pay shall be for forty hours and two weeks' for eighty hours at

straight time rate. Employees eligible for vacations but laid off or no longer in the employ of the Company shall receive vacation pay in lieu thereof.

* * * * *

Any employee who has worked a total of twenty-four (24) straight time hours during his regular or normal work week in which any of the following holidays falls, shall be paid for eight (8) hours straight time in addition to pay for any time actually worked on such holiday: New Year's Day, Lincoln's Birthday, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Columbus Day, Election Day, Armistice Day, Thanksgiving Day and Christmas Day.

7. On or about October 21, 1952, November 1, 1952, and December 5, 1952, three suits were filed in the lower courts of New Jersey against Dade, the same being identified and entitled *Todd, et al.* v. *Dade Bros., Inc., et al.* (Docket No. 63243, Hudson County Ct., Law Division); *Bryant, et al.* v. *Dade Bros., Inc., et al.* (Docket No. L-1690-52, N.J. Super. Ct., Hudson County); and *O'Brien, et al.* v. *Dade Bros., Inc., et al.* (Docket No. L-2588-52, N.J. Super. Ct., Hudson County). The suits were instituted respectively by 21, 29, and 4 employees of Dade who were members of the Marine Warehousemen's Local. The suits named as defendants, in addition to Dade, Local No. 1478, Vincent Brown and Anthony Piscopo (officers of Local No. 1478), Augustine DeAcutis (hiring boss for Dade and also an officer of Local No. 1478), James Cissel (vice president and project manager of Dade), and Hugh McGill (labor relations manager of Dade). The complainants sought recovery of certain alleged holiday, vacation, and Sunday pay or pay differen-

tials. Primarily, however, the complainants alleged that the employees and members of the union had been denied seniority rights and employment to which they were entitled beginning on August 14, 1952, to and including the date of suit, and that such denial was "by reason of the malicious and unwarranted action" of or by reason of conspiracy among the defendants in the suit. In addition to damages consisting of alleged loss of wages, each of the complainants sought $5,000 "compensatory and punitive damages."

8. In answer to the three complaints, Dade admitted that the employees were entitled to the "fringe benefits" such as wage increases, vacation pay, holiday pay, overtime and insurance, as alleged in the suits, and so did not oppose entry of partial summary judgment therefor. On January 13 and January 23, 1953, judgment was accordingly entered in favor of the employees for said fringe benefits in the sum of $14,912.50. The judgment was thereafter paid by Dade. Defendant subsequently approved reimbursement to Dade for the amount of the judgment and other disbursements and for the major portion of the attorney fees incurred in that phase of the litigation.

In answer to the remaining allegations of the complainants involving deprivation of seniority and employment, Dade and its officials denied that they had refused to hire the employees subsequent to August 14, 1952, as asserted in the complaints, or that they had acted in any way in concert with the officials of Local No. 1478 for the purpose of depriving the employees of their seniority rights or benefits. They contended, rather, that the employees had

participated in work stoppages in violation of the union agreement of December 1, 1951, and that Local No. 1478 had, without Dade's advance knowledge or ability to control, imposed upon the employees such discipline as loss of seniority rights. They contended that the dispute was entirely an internal union matter.

9. The three suits were consolidated in the Superior Court for jury trial, which commenced on November 23, 1953, and concluded on December 10, 1953, at which time the trial court entered judgment on the verdict of the jury as follows: In favor of 43 employees against Dade and Local No. 1478 in the total amount of $25,841.60 compensatory damages and $8,600 punitive damages, or a total of $34,441.60; and in favor of all individual defendants and against the employees. As a result of said verdict the employees were held entitled to compensation during the period that they were deprived of their rights to work under the union agreement subsequent to August 14, 1952. On July 9, 1954, the judgments in the three cases were amended, on the mandate of the Appellate Division of the Superior Court dated June 21, 1954, to reflect that no verdict was returned either for or against the individual defendants.

10. Dade prosecuted an appeal to the Appellate Division of the Superior Court of New Jersey from the judgments entered by the trial court in the three suits. On November 4, 1954, the Appellate Division affirmed the judgments as amended. The opinion of the court reads in part as follows:

> The record discloses that plaintiffs were warehousemen in the employ of Dade Bros., Inc. at the

Claremont Terminal, a waterfront pier in Jersey City. They were members of the defendant labor union, which had a collective bargaining contract with the employer. Under that contract the employees had certain seniority rights.

Apparently the men employed on a day to day basis. They would assemble or "shape up" on the pier each morning and an employee of Dade Bros., known as the hiring boss, would make individual selections among the men until the required number for the day was reached. The hiring boss was the defendant, Augustine De Acutis, also a member of the union and for part of the period involved president thereof. Originally he was engaged as a stevedore and later he became hiring boss, a position he held for about eighteen months until the Terminal closed on October 31, 1952.

De Acutis was active in the union, which apparently was in the throes of internal dissension arising out of his conduct as hiring boss. The plaintiffs claimed that their seniority rights to employment under the contract were being ignored at the morning shape-ups by De Acutis with the consent and cooperation of the employer. Dade sought to take the position at the trial that De Acutis was designated hiring boss by the union and that it had no control over his activities. However, without detailing the evidence, a clear factual issue on this subject was presented for determination by the jury.

In any event on June 24, 1952, because of alleged indiscriminate hiring without regard to length of service and for other grievances connected with contract benefits, the aggrieved warehousemen struck. The strike lasted one day, when according to the plaintiffs an oral agreement was reached to remedy the conditions and they returned to work.

However, the next day at the shape-up the agreement was ignored and on June 26th, 158 warehousemen struck and engaged in picketing until July 7th. During this period plaintiffs asserted that the employer agreed with their committee to prepare and post a seniority list to be followed. Proof was introduced to demonstrate that this and other promises made were not fulfilled and that there continued to be a disregard of seniority. The result was that the men walked out again on July 24th and resumed picketing.

Evidence was introduced to show that during the early part of this picketing, the employer through its representatives, and particularly the vice president in actual charge of the pier operation, stimulated and activated a situation between the non-strikers and the pickets which led to a serious commotion and near riot and which might have ended in a large scale physical affray if it were not for substantial efforts of the local police. . . .

. . . . . .

Thereafter, on August 5th, a conference was held between the committee of the strikers and representatives of the union, with representatives of the employer in attendance. At this meeting one Connolly, a vice president of the International Longshoremen's Association, said to the committee: "You'se fellows is out. Those loyal men are going to work and you is out." This broke up the meeting and the strikers resumed picketing.

In addition to the picketing, the strikers instituted an injunction suit in the Chancery Division of this court against the International, the Local union and certain of their officers, including Connolly and De Acutis.

Public officials of Jersey City having interested themselves in the affair, further conferences were held at the City Hall at which company, union and insurgents were present. Finally on August 13th an agreement was reached and a written but unsigned memorandum made of the terms thereof.

Under this memorandum among other things "the entire dispute" was to be submitted to independent arbitration. The specific nature of the dispute was not described but plaintiff contended that it related to the seniority question. In listing the matter agreed upon, paragraph 4, said, "Return of the men to work immediately, with insurgent members to be absorbed as soon as possible."

At the trial, the Dade Bros. contended that the concord signified by this paragraph was that pending the arbitration all of the "loyal" men who had not gone on strike would be employed first, regardless of seniority, and that when they were taken care of the strikers would be hired as the need arose. And it further claimed that the strikers agreed to waive seniority until the arbitration ended.

The strikers claimed that the agreement was, and that paragraph 4 was intended to indicate, that all men were to return to work immediately, with the insurgents absorbed in the day to day hiring on the basis of seniority. And they claimed with much force that they would not have agreed to withdraw their picket line and give up or waive, pending the arbitration, the very thing which they had been struggling to enforce, i.e., their seniority rights.

As to this trial court held, and we concur in his view, that the language of the paragraph was ambiguous and that the jury should decide on the basis of the proof what the agreement between the parties was in fact.

Plaintiffs' proof shows that Dade Bros. did not hire through De Acutis, the hiring boss, according to seniority between August 15 and September 22nd, the date of the rendition of the arbitrator's decision. In fact, Dade's brief on this appeal says that it "concedes that plaintiffs would have been entitled to employment during the period August 15th to September 22, 1952, by virtue of seniority, if there had not been a waiver of such seniority." Of course, the verdict of the jury must be taken as a finding that no such waiver was made.

The arbitration hearings were held on September 3rd and 9th, 1952, at which, according to the arbitrator, the sole issue submitted was whether the action of the union in depriving the strikers of their seniority for what the union called an unauthorized strike was proper. The written decision of the arbitrator rendered on September 22nd was to the effect that the action was improper and that the deprivation of seniority could not be sustained.

Plaintiffs offered proof tending to show that, despite this decision, the hiring boss and the company, with few exceptions, continued to ignore their seniority rights thereafter and down to October 15, 1952, the last date for which the plaintiffs claim compensation.

Dade argued that plaintiffs engaged in wildcat strikes without authorization of the union and in violation of the management-union collective bargaining agreement which established machinery including arbitration for the handling of disputes. However, the jury must have regarded it as significant that Dade never undertook to discharge the plaintiffs, which manifestly would have been its right if there was no basis for the charges of unfair labor practices with regard to seniority and if the strikers were illegal.

In any event, testimony was offered indicating that neither the union nor the employer's representatives would listen to the grievance complaints of these men, despite the fact that the vice president in charge of the operation conceded he had complaints that De Acutis "took extreme and brutal discriminatory disciplinary action." One witness said that both the company and the union laughed and sneered at their grievances. And there was evidence that the men were shunted back and forth between the union and the employer's officials, accomplishing nothing with respect to vindication of their claims. Another plaintiff said that one of two Dade representatives was always present at the shape-up. When De Acutis ignored his seniority in hiring the men for the day and he complained to these company men, he got nowhere. It appeared, however, that when the company's warehouse superintendent wanted a man put on, he said to De Acutis: "I am putting this man on today," and it was done.

There was much dispute in the testimony, the employer's position being that it was the innocent victim of dissension within the union. However, there was ample proof to warrant a finding by the jury that the employer and the union acted in concert in wilfully and maliciously interfering with plaintiffs' right to employment under the collective bargaining agreement. *Kuzma* v. *Millinery Works, etc. Local 24*, 27 N. J. Super. 579 (App. Div. 1953). Our appraisal of all of the proof made in the light of the basic rule that due consideration must be given to the opportunity of the trial court to see and hear witnesses, has led us to the conclusion that the action of the jury was not contrary to the weight of the evidence.

* * * * *

> It must be assumed from the charge of the court and the fact of the verdict against the employer that the jury found the employees as representatives of their employer, guilty of the tortious conduct complained of. The fact that the personal liability of the employees was not declared by way of individual judgments against them, for some unexplained reason, should not and does not vitiate the declaration of the employer's responsibility.

11. Dade thereupon filed a timely petition for certification before the Supreme Court of New Jersey, which, on May 23, 1955, affirmed the judgments below without opinion.

12. When the three suits were filed against Dade (finding 7, *supra*), Dade submitted timely requests under the terms of the contract for representation by the United States attorney for the District of New Jersey.

13. The United States attorney for the District of New Jersey, as instructed, entered formal appearances on behalf of Dade soon after the commencement of the *Todd* and *Bryant* suits, but the United States attorney's appearances on behalf of Dade were subsequently withdrawn. The body of a letter dated December 20, 1952, addressed to Dade from the Contracting Officer, read as follows:

> This office was informally advised on 18 December 1952 by the East Ocean Division, Corps of Engineers, and Mr. John Barry, Assistant United States Attorney that instructions have been received from the Attorney General's Office, Washington, D.C., directing the United States Attorney for the District of New Jersey to withdraw from the defense

of the subject lawsuits and to arrange to have private counsel substituted.

In the absence of the officers of your organization whom we were advised were out of town, the foregoing information was orally transmitted to Mr. Esposito of your office immediately upon receipt thereof.

In view of the foregoing, it shall be necessary for you to retain private counsel to defend the litigation. It is imperative that immediate action be taken in this matter since there is now pending before the Court a motion for partial summary judgment which has been adjourned due to the substitution of counsel from 19 December 1952 to 9 January 1953.

The question of reimbursability of the cost and expenses of such litigation including judgments and court costs together with reasonable attorney's fees for private counsel shall be determined by the Contracting Officer at a later date.

Dade thereafter advised defendant that John E. Keale had been retained to undertake the defense of the litigation.

14. On December 30, 1952, the Contracting Officer wrote Dade concerning the *O'Brien* suit as follows:

> This letter is to confirm numerous conversations had between Mr. Condon and Mr. Hodes of this office with Messrs. Clark, Cissel and Esposito of your office, commencing December 18, 1952, in which you were informed that the U. S. Attorney would not be able to represent you in the defense of the above action and of the necessity of your immediately retaining your own attorney for that purpose.

It is reiterated that it is imperative that immediate action be taken by you in this matter, if same has not already been done.

The question of reimbursability of the cost and expenses of the subject litigation, including judgments and court costs together with reasonable attorney's fees for private counsel shall be determined by the Contracting Officer at a later date.

15. By letter dated January 20, 1953, Dade's executive vice president advised the Contracting Officer that Dade had retained its own counsel in two prior cases and requested advice as to whether or not it should retain counsel in the action instituted by *O'Brien, et al.* The letter further stated that in the event the Government did not furnish counsel, Dade would continue to retain private counsel and would look to the Government for reimbursement under the provisions of the contract. In response, the Contracting Officer, by letter dated January 21, 1953, advised that Dade had received instructions with reference to the retention of private counsel in the letter of December 30, 1952 (finding 14, *supra*).

16. Under dates of September 4 and September 21, 1953, Dade addressed two letters to the Contracting Officer in which Dade insisted upon a ruling as to the reimbursability of the litigation expenses in connection with the three lawsuits. A responding letter from defendant dated November 18, 1953, reads in pertinent part as follows:

> This office authorized payment on a reimbursable basis for those portions of these suits which sought "fringe benefit" payments under the retroactively approved collective bargaining agreement you made

with the Union concerned. Since, through no fault of yours, the U. S. Attorney withdrew as defense counsel and you retained private counsel to conclude that phase of the matter, there can be no doubt that all proper litigation expenses applicable to those counts, including a proper proportion of a reasonable attorney fee covering the entire case, will ultimately be approved for reimbursement. However, the term "reimbursement", particularly as used in your CPFF contract, does not envisage solicitation of the Government until you have yourself concluded a payment of the basic obligation.

Moreover, as to litigating attorneys' fees, for obvious reasons it has always been the policy of the Corps of Engineers, in administering CPFF contracts, to consider reimbursement questions only after the suit is concluded.

As to the remaining counts in this litigation, which primarily involve charges that you conspired to deprive these plaintiff-employees of certain of their contract rights, it seems clear that the merits of the matter will not be known to the Government with certainty until after the court(s) has concluded action on the cases. As to that phase of the matter, all litigation expenses and fees will have the same status as the potential judgment. Since your reimbursement rights under the CPFF contract (DA-30-347-ENG-4) cannot therefore be determined as yet on said phase of the matter, the Contracting Officer was correct in refusing to make a premature ruling for you.

The Office of the Judge Advocate General, as legal advisor to the Secretary of the Army, has been formally consulted in these regards, and concurs in the above views.

17. The body of the letter dated December 15, 1953, addressed to defendant's Contracting Officer from the vice president of Dade, reads as follows:

> This will confirm the telephone conversation held with your office this date regarding the referenced law suit.
>
> We are enclosing a copy of a letter received from our attorney this date in which he recommends that an application for a new trial should be made, and in the event that such application should be unsuccessful, an appeal should be taken.
>
> The Contractor concurs with the recommendation of its attorney and asks that authorization be granted by the District Engineer to continue this matter along the lines suggested by the legal counsel.
>
> It should be noted that application for a new trial must be made within ten days after the verdict of the jury. The verdict was handed down on December 10; therefore authorization from your office should be received on or before December 18.
>
> So as to forestall any executions on the part of the plaintiff's attorney against our New Jersey bank accounts, we are proceeding immediately to post a bond equal to the amount of the judgment ($35,000) pending your approval of the above-outlined course of action.
>
> In the event that you require further or more detailed information, please advise.

18. The body of the letter dated December 22, 1953, addressed to Dade from the authorized representative of the Contracting Officer, reads as follows:

> Reference is made to your letter to this office, same subject as above, dated 15 December 1953, and to

letter from your attorney to you, dated 14 December 1953, attached thereto. This letter confirms telephone conversation had between Mr. Hodes, Assistant Chief, Legal Branch, this office, and Mr. Van Ness, your office, on 18 December 1953, in connection with subject matter contained in aforesaid letter of 15 December 1953.

You are hereby advised that this office cannot, at this time, grant authority to you to take the action as proposed and indicated in your said letter of 15 December 1953 and in the aforesaid letter from your attorney, dated 14 December 1953.

This office will give consideration to the question of reimbursability of any payments on the judgment in the subject litigation which you may be compelled to make and of any other expenses incurred in connection with said litigation and any future legal proceedings which may ensue with respect thereto, after the subject litigation has been conclusively determined. It is suggested that with respect to the proposed application for a new trial and appeal from the judgment, you should be guided in your decisions by sound business and legal judgment.

This letter should not be contrued as a direction to you to refrain from taking any of the proposed legal steps referred to above.

19. Under date of February 23, 1954, plaintiffs' attorney wrote the Chief of the Legal Branch of the Atlantic District Engineer and advised that its attorney, Thomas J. Brogan, had initiated preparation of an appeal from the judgment of the Superior Court and requested reimbursement of printing expenses which were being incurred. Under date of March 15, 1954, the Chief of

the Legal Branch informed plaintiffs' counsel that the question of reimbursement for costs incurred in connection with the referenced litigation "cannot be considered until after litigation had been conclusively determined."

Dade did not seek "authorization" or "approval" from the Contracting Officer for its subsequent petition for certification before the Supreme Court of New Jersey.

20. By letter dated May 25, 1955, plaintiffs' counsel wrote to the defendant as follows:

> I have been informed today that Dade Brothers, Inc. has lost its appeal to the State of New Jersey, and that the court has affirmed an award of $34,442 to certain workers and former employees of Dade Brothers, Inc. I have not as yet received a copy of the decision, but will forward you one just as soon as I do.
>
> In the past, when I have made formal and informal requests for reimbursement to Dade Brothers, Inc., for costs incurred in connection with the above referenced litigation, the Chief of the Legal Branch of the Atlantic District and the Judge Advocate General have informed me that the question of such reimbursement could not be considered until after litigation had been conclusively determined. The litigation has now been conclusively determined.
>
> Vouchers have already been submitted to you periodically in the amount of $22,582.25, representing legal, printing and bonding fees incurred in connection with the suit. In addition thereto, Dade Brothers, Inc., has received an additional bill from its counsel; Judge Brogan, in the amount of $10,979.94, of which Dade Brothers, Inc., has paid $2,500, making in all total payments by Dade Brothers of $25,082.25.

I am herewith enclosing for your information and convenience a breakdown of the legal, printing and bonding fees incurred to date on this matter, totalling $33,562.19, which together with the judgment of $34,442 represents a total approximate expense of $68,004.19. In addition to this amount, further vouchers will be submitted for time actually spent in assisting in the preparation of this case, testifying, etc. on behalf of Messrs. James Cissel, George C. Dade, E. T. Clark and certain other attorneys and accountants. I would estimate that the total claim will be approximately $80,000 to $85,000.

Although the aforementioned judgment with the exact amount will be forwarded to you later together with certain other vouchers as mentioned above, please consider this as a formal claim for reimbursement of any and all costs incurred in connection with the above referenced litigation and particularly covered by Article IV(t) of Contract No. DA-30-347-ENG. 4.

Since I am anxious to complete this matter as promptly as possible, would you please render me you decision as to reimbursement within the next seven days. The only decision which I am interested in at this time is whether or not you will generally and as a matter of principle reimburse the cost incurred in connection with the litigation. I am not, at this time, interested in individual items or amounts which you may or may not approve and which may be subject to negotiation.

I am enclosing two extra copies of this letter so that you may forward them to the Judge Advocate General's office, where I understand the decision is to be made.

21. Dade supplemented the letter of May 25, 1955, with a letter dated June 6, 1955, again requesting a decision as

to reimbursement in connection with the cost incurred with reference to the litigation. Under date of June 7, 1955, defendant replied in part as follows:

> Your request for reimbursement is being given appropriate consideration. However, no final determination can be made until you have furnished this office with a full and complete itemized statement of the total costs in connection with subject litigation.
>
> Your prompt compliance with this request will expedite a decision concerning the subject of reimbursement.

22. Subsequent to June 6, 1955, the Contracting Officer received several additional letters from plaintiff's counsel requesting a decision, and the Contracting Officer made several requests for cost breakdowns so that a proper determination could be made. On September 8, 1955, plaintiff's attorney wrote to the Contracting Officer demanding payment to Dade of $73,160.39, and stating:

> The only other invoice which will be submitted to you will be my bill for legal services incurred, unless the matter should be prolonged or subsequently litigated. In that event, of course, it will be necessary for Dade Brothers to incur certain accounting expenses and additional legal expenses. At such time as this matter is finally resolved my final bill for legal services will be submitted to you. (We have determined that no bill for accounting services rendered by Mr. Esposito will be submitted to you unless the matter goes further.)

Plaintiffs' counsel also requested that if the Contracting Officer's decision was unfavorable it be reduced to writing

under Article X, the Disputes clause, and forwarded to him. The Contracting Officer requested that plaintiffs' counsel furnish his "charge for legal services to date," and thereafter received from plaintiffs' counsel a copy of an unitemized bill for $2,500 for services from May to September 23, 1955.

23. By letter dated October 27, 1955, the Contracting Officer rendered a decision under the Disputes clause of the contract, which letter reads in part as follows:

> By letter, dated 25 May 1955, the Contractor advised this office that the Supreme Court of the State of New Jersey had affirmed adverse lower court decisions in subject litigation and requested reimbursement of the judgment, interest, court costs, legal fees and related expenses pursuant to Article IV, paragraph 1, subparagraph (t) of the contract. To date, the Contractor's total claim for reimbursement is the sum of $75,660.39.
>
> It is the determination of the Contracting Officer that in the performance of subject contract, the Contractor has failed to faithfully comply with the terms of the contract as indicated in the attached Findings of Fact in support of this determination. Accordingly, the request by the Contractor for reimbursement of the total amount of $75,660.39 is disapproved, except that the Contractor will be reimbursed for the sum of $522.65 which represents reasonable counsel fees and disbursements payable to John E. Keale, Esq., in connection with the fringe benefit phase of subject litigation.
>
> You are advised that the foregoing constitutes the final decision of the Contracting Officer. Your attention is invited to Article X of the Contract entitled "DISPUTES", whereby you may appeal this

decision to the Chief of Engineers within thirty (30) days after receipt of this decision. If appeal is taken, same should be processed through this office to facilitate action thereon.

The Contracting Officer's findings of fact which accompanied the letter of October 27, 1955, read in part as follows:

> 13. The Contractor has requested reimbursement in connection with subject litigation under Article IV (t) of the prime contract for the following:
>
> a. Judgment, interest and costs—$38,245.81.
>
> b. All legal fees and other expenses related to the litigation in the total amount of $37,414.58 as indicated * * *.
>
> 14. It is the determination of the Contracting Officer that Dade Brothers, Inc. is not entitled to be reimbursed as requested under Article IV, paragraph 1, subparagraph (t) of the basic contract, for the judgment and litigation expenses set forth in the preceding paragraph for the following reasons:
>
> a. In addition to compensatory damages, punitive damages in the amount of $200.00 for each of the forty-three plaintiffs were assessed against Dade Brothers and Marine Warehousemen's Local No. 1478. The assessment of punitive damages establishes that Dade Brothers maliciously and wilfully perpetrated a wrong upon each of the plaintiffs in subject litigation by its refusal to recognize the seniority rights as established by the union agreement. Generally, a verdict for punitive damages is justified when it is determined that the defendant

maliciously and wantonly agreed to perpetrate and to commit a tort and did so.

b. The Contractor flauntingly violated Article I, paragraph 4 of the contract which provides that "The Contractor, upon the responsibility if its corporate officers, shall (1) faithfully and diligently administer performance of this contract; (2) carefully recruit, furnish, supervise and maintain an adequate force of competent and dependable employees; * * * (5) do and perform all other administrative and managerial services reasonably required to perform, with diligence and dispatch, all obligations of this contract".

c. Subject litigation did not arise out of the faithful performance of the contract as provided in Article IV, paragraph 1, subparagraph (t) of the contract which provides as follows:

"In the event the Contracting Officer shall determine that the best interests of the Government require that the Contractor initiate or defend litigation in connection with claims of third parties arising out of the performance of this contract, the Contractor will proceed with such litigation in good faith and the cost and expense of such litigation, including judgments and court costs, allowances rendered or awarded in connection with suits for wages, overtime or salaries, and reasonable attorney's fees for private counsel when the Government does not furnish Government counsel, shall be reimbursable under this contract." [Underscoring supplied.]

d. The final determination by the Court conclusively establishes that the Contractor wilfully and wantonly violated Appendix D, paragraphs 1a and 1a2 which provide as follows:

"1a. The Contractor will abide by all the terms and conditions of the Union Agreement with the following groups of employees."

"1a2. The Marine Warehousemen's Local affiliated with the International Longshoremen's Association covering warehouse employees."

15. In view of the foregoing, the Contractor's request for reimbursement has been denied except to the extent indicated hereinabove.

24. On November 25, 1955, pursuant to the Disputes clause of the contract, Dade appealed the determination made by the Contracting Officer on Dade's claim for $75,660.39 (of which $522.65 was allowed for Mr. Keale's services in addition to prior amounts) to the Chief of Engineers, and demand was made that Dade be awarded a balance of $75,137.74 plus interest. Thereafter, a 3-day hearing was held on the matter by the Engineers Claims and Appeals Board, which was the duly authorized representative of the Chief of Engineers to hear and determine appeals from decisions of the Contracting Officers. At the hearing both Dade and defendant were represented by counsel.

Mr. E. Treverton Clark, Dade's executive vice president, testified extensively at the hearing. Mr. Clark, from January until May 1952, was the top representative of Dade at the Claremont Terminal, but was not in charge of actual operations at the Terminal at the material times; he had not been a defendant in the New Jersey litigation. Mr. Clark denied that he had at any time entered into a conspiracy with any delegate or officer of the union against the persons who were plaintiffs in the lawsuits

against Dade. Mr. Clark stated that the head of the International Longshoremen's Association controlled Dade's hiring boss, Mr. DeAcutis; that Dade could not have fired or replaced Mr. DeAcutis as hiring boss without running the risk of a strike; and that he (Clark) did not know whether or not Mr. DeAcutis hired workers in conformity with the requirements of the agreement between Dade and the union. Mr. Clark further testified in effect that defendant's agents were apprised of and acquiesced in all of the major policy decisions of Dade, including Dade's major employer-employee decisions. Defendant offered no oral testimony at the hearing.

There were introduced into the record at the Board hearing numerous exhibits, including testimony before a subcommittee of the Committee on Interstate and Foreign Commerce of the United States Senate respecting waterfront racketeering and port security on the New York-New Jersey waterfront, correspondence between the parties, the Contracting Officer's decision, and the proceedings in the suits against Dade, including the opinion of the Appellate Division of the Superior Court of New Jersey affirming the judgments.

25. Under date of April 4, 1957, the Corps of Engineers Claims and Appeals Board rendered its decision sustaining the decision of the Contracting Officer. The opinion of the Board reads in part as follows:

> In the instant case the expenses for which reimbursement is sought arise directly from the New Jersey litigation, and accordingly must be evaluated within such frame of reference. Fundamentally, the New Jersey litigation constituted a suit to

recover compensatory and punitive damages resulting from a tortious and malicious interference with the right to work. These are not the words of this Board; they are the words of the Appellate Division of the Superior Court of New Jersey. The Appellate Court noted the plaintiff's claim that their seniority rights were being ignored at the morning shape-ups by the hiring boss with the consent and cooperation of Dade, and concluded that there was ample proof before the trial court to warrant a finding by the jury that the employer of the Union acted in concert in wilfully and maliciously interfering with plaintiff's right to employment under the collective bargaining agreement.

Thus it is established by the New Jersey Courts that Dade, as well as its Vice President Cissel and its Labor Relations Manager McGill, was guilty of the tortious conduct of entering into a conspiracy with the defendant Union to deprive certain Union members of their seniority rights under the Union Agreement. But appellant has asserted that the decision of the New Jersey Courts is not res judicata as to the issues before this Board, and has introduced testimony in contradiction of the findings of such courts. We must agree of course that the New Jersey decision is not in any formal sense res judicata as to the dispute before this Board. The parties are distinct and the issue is different. This, however, is not conclusive of the problem. Although as already indicated the appellant has offered to this Board some testimony contrary to the findings of the New Jersey Courts, there has been generally no tendency to retry here the issues there considered. This is due as much to a tacit recognition of the impossibility of duplicating before an administrative board of this nature an extensive trial before a judge with jury as it is to appellant's

insistence that notwithstanding the outcome of the New Jersey litigation, the appellant is entitled to reimbursement under its contract.

* * * * *

* * * We are persuaded not only by the authority of the *Robertson Aircraft Corporation* decision, BCA No. 1241 but equally by the compulsion of logic that a contractor who commits a malicious and wilful tort in derogation of the contract provisions cannot be said to be in the commission of such tort acting within the framework of the contract within the meaning of Article IV(1)(t) aforequoted. In other words, the conspiracy cannot be considered as arising out of the performance of the contract; it was an act beyond the intendment and beyond the scope of the contract. Not only was the conspiracy in direct derogation of the injunction placed upon the appellant by Appendix "D" to abide by all of the terms and conditions of the Union Agreement, but it was equally violative of the labor policy of the Government as expressed in the National Labor Relations Act. It would be unreasonable to hold that the contract requires the Government to reimburse a contractor for the litigation costs arising out of the wilful and malicious action not only violative of the rights of third parties but in contradiction to the very terms of the contract itself. * * *

* * * * *

* * * But in the case presently before this Board we are not dealing with negligent conduct but with conduct found by the Courts to be willful and malicious, nor are we dealing with the acts of minor employees, but with the torts of a Vice President and a Labor Relations Manager, both representatives of top management. * * *

Finally, this Board rejects the argument that the Government by knowledge of labor conditions at the waterfront or by tacitly consenting to the hiring of private counsel waived its right to deny reimbursement to the appellant. In the first place, there has been no evidence or even any allegation indicating that the contracting officer was aware of or had reason to be aware of the existence of the conspiracy found by the New Jersey Courts. The most that can be said is that the contracting officer knew generally of the labor conditions at the waterfront, but that is a far cry from knowledge of conspiracy. As for the action of the Government in consenting to the hiring of private counsel, such action seems to us to be completely consistent with normal procedure, particularly when the appellant denied the acts for which the court ultimately imposed liability. And even here the correspondence clearly indicates that the Government did not promise reimbursement, but specifically stated that reimbursability of litigation costs and attorney fees would be determined upon the outcome of litigation. As this decision has indicated, such a position was discreet.

For all of these reasons, the Board concludes that appellant is not entitled to be reimbursed for the costs of defending the New Jersey litigation or for the judgment costs in connection therewith and this appeal must be and is hereby DENIED.

26. On April 30, 1957, Dade, pursuant to Article X of the contract, appealed the decision of the Corps of Engineers Claims and Appeals Board to the Secretary of the Army. Through his designated representative, the Army Contract Appeals Panel of the Armed Services Board of Contract Appeals, the Secretary of the Army, after a

further hearing and consideration of the briefs submitted, denied Dade's appeal for reimbursement of the aforesaid expenses in the amount of $75,137.74 plus interest. The opinion of the Board reads in part as follows:

> Our problem may be simply stated: Has the appellant satisfied the Board, with evidence of record, that the decision of the contracting officer was erroneous? In an appeal attacking the validity of findings of fact or a decision by a contracting officer, not patently erroneous, it is incumbent upon the appellant to come forward with evidence showing error therein. In the absence of such evidence this Board cannot properly overrule the decision of the contracting officer. Appeal of *A. E. Rätner Chemical Co.*, ASBCA No. 474, 5 CCF 61113.
>
> In support of its burden, the appellant has laid before us everything that was received by the Board below, the transcript of that hearing, briefs and arguments, and briefs with appendices presented on appeal to the Appellate Division and Supreme Court of New Jersey that were added to the file by agreement. We discount the briefs and arguments, for recital of a fact or an alleged fact therein is not evidence before the Board. Appeal of *Korbin Box Manufacturing Co.*, ASBCA No. 455.
>
> At the time the decision was made under the "Disputes" article, the contracting officer had before him a set of facts, one of which was the judgment handed down against Dade Brothers, affirmed on appeal by the highest court, The Supreme Court of New Jersey. That was a fact that he could not ignore, and it translated into the meaning that punitive damages and compensatory damages had been imposed upon the appellant for a breach of contract and a conspiracy to deprive the plaintiffs

of their contractual right to work. The contract involved in that suit was the union-management contract from which we quoted above and which the appellant was required by its contract with the Government to observe fully and faithfully. In view of the confirmed judgment of the New Jersey court, the contracting officer was completely justified in reaching his first, second and fourth reasons for denying the appeal. That set of reasons is the equivalent of a finding that the appellant wilfully breached its contract with the union and in the same act breached its contract with the Government. The remaining reason, i.e., that the litigation did not arise out of faithful performance of the contract, seems to flow necessarily from the others, for it would require the rarest of circumstances, as to which we are unwilling to conjecture, to transform a breach of contract into faithful performance of the contract.

The appellant has not shown us that the judgment does not exist nor that it is erroneous, nor that the appellant did not breach both the union contract and the Government contract, nor that when the acts that resulted in the litigation were committed the appellant was engaged in the faithful performance of its Government contract.

The appeal is denied.

27. This case is before the court on a stipulation of facts agreed upon by the parties, together with numerous exhibits, including all documents and proceedings referred to in this report. No oral testimony was offered in this court. The parties have agreed to reserve the determination of the amount of recovery, if any, for further proceedings under Rule 38(c).

28. The entire record of the case does not establish that the decision of the Armed Services Board of Contract Appeals was arbitrary, capricious, or unsupported by substantial evidence.

COURT OF CLAIMS CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are not entitled to recover, and the petition is therefore dismissed.

Opinion of Armed Services Board of Contract Appeals

ARMED SERVICES BOARD OF CONTRACT APPEALS

WASHINGTON, D. C.

Appeal of—
DADE BROTHERS, INC.
Under contract No. DA 30-347-ENG-4 } ASBCA No. 4315

APPEARANCES FOR THE GOVERNMENT:

COLONEL JAMES GARNETT, JAGC
LT. COLONEL J. F. BISHOP, JAGC
Chief Trial Attorneys

CAPTAIN ERVIN W. DICKSON, JAGC
SAMUEL HODES, Esquire
DAVID S. KELSON, Esquire
Trial Attorneys

APPEARANCES FOR THE APPELLANT:

JAMES A. CUDDIHY, Esquire

OPINION BY COLONEL BARD

This is an appeal from a decision of the Corps of Engineers Claims and Appeals Board (C&A 980) dated 4 April 1957. The decision below denied appellant's appeal, arising out of a claim for reimbursement of litigation expenses and a judgment rendered against it, allegedly attributable to performance under the captioned cost-plus-a-fixed-fee contract. We held a hearing devoted exclusively to argument and the admission of a stipulation and two docu-

ments but will, of course, also consider everything that was received by the Corps of Engineers' Board.

The contract was a cost-plus-a-fixed-fee agreement for terminal operation and service at the Claremont Terminal, Jersey City, New Jersey. During the contract period, calendar year 1952, the appellant was to furnish labor and all other things necessary to receive, prepare for shipment and deliver to dockside all construction equipment and materials tendered by the Government for shipment to overseas projects under the jurisdiction of the Corps of Engineers. The overseas operation was termed a "crash program" of such a nature that uninterrupted flow of supplies and equipment was, from the Government's viewpoint, the paramount consideration. Certain additional functions were required by the contract, but we need describe only the following:

> "The Contractor, upon the responsibility of its corporate officers, shall (1) faithfully and diligently administer performance of this contract; (2) carefully recruit, furnish, supervise and maintain an adequate force of competent and dependable employees; (3) fully supervise and coordinate, subject to plenary control by the Contracting Officer, the performance of all subcontracts; (4) expedite the procurement of materials and equipment necessary for performance of the contract; and (5) do and perform all other administrative and managerial services reasonably required to perform, with diligence and dispatch, all obligations of this contract."

The contract included a "Changes" article; "Disputes" article; and the following paragraph, one of several in Article IV, "Cost of the Work":

> "In the event the Contracting Officer shall determine that the best interests of the Government require that the Contractor initiate or defend litigation in connection with claims of third parties arising out of the performance of this contract, the Contractor will proceed with such litigation in good faith and the cost and expense of such litigation, including judgments and court costs, allowances rendered or awarded in connection with suits for wages, overtime or salaries, and reasonable attorney's fees for private counsel when the Government does not furnish Government counsel, shall be reimbursable under this contract."

Appendix D to the contract provides:

> "The Contractor will abide by all the terms and conditions of the Union Agreement with the following groups of employees.
>
> "1. The International Longshoremen's Association, covering longshoremen, checkers and clerks.
>
> "2. The Marine Warehousemen's Local affiliated with the International Longshoremen's Association covering warehouse employees."

* * * * *

The practice out of which this appeal arose was the manner of hiring enough men to man the installation. Each morning all men who wanted to work that day would assemble, or "shape up", and the hiring boss, an employee of the appellant, would select men by name or badge number until enough for the day's work had been hired. Appellant was bound to the Marine Warehousemen's Local by a collective bargaining contract that recognized seniority rights in the employees." DeAcutis, the hiring boss,

however, ignored seniority in selecting workmen for the day, and did select men who were not entitled to employment by virtue of seniority. It is the appellant's contention that the Government was fully aware of the conduct of the hiring boss and took no steps to remedy the situation by discharging him. It would appear, however, that the possible remedy was more to be feared than the illness, for the connections of the hiring boss with the International Longshoremen's Union, with the Warehousemen's Local, and various powerful criminal elements were such that if DeAcutis had been discharged, in all probability there would have been no work done at the Terminal. The President of the parent union, in fact, so informed officials of the appellant.

Preferential hiring continued, and it is clear that officials of the appellant were often present at the shape up and observed the discriminatory practices. It is established that company officials also disregarded seniority on occasion by indicating to DeAcutis that certain individuals were to be hired. At last, a series of strikes occurred: one day on 24 June; eight days commencing 26 June; and twenty-three days from 22 July-13 August. Certain basic labor problems were referred to a conference between city officials, the union and management on 8 August, resulting in a written memorandum to the effect that the men would

* (C) Employees shaping regularly for each company shall be entitled to employment in work for which they have the necessary qualifications in order of their seniority with the Company. Employees voluntarily leaving or discharged from the company's employ shall forfeit all claims to seniority previously established. Employees failing to shape for a period of two months shall be deemed to have voluntarily left the employ of the company. In computing total length of service, leaves of absence authorized by the company and temporary transfers to positions not covered hereby, shall be considered as time served.

go back to work immediately, with insurgent workers to be absorbed as soon as possible. The matter was submitted to arbitration, in which the decision, dated 22 September 1952, stated in part that the strikes were not authorized by the union and that the strikers were deprived of their seniority by the union and not by the appellant.

The contract was terminated in October 1952, after thirty days' notice, for the convenience of the Government. In December 1952 the strikers brought suit in New Jersey for compensatory damages in the amount of the wages lost because of unlawful interference by the appellant with their contractual rights and their right to work. Another count sought recovery from the union and its officials for refusing to permit the plaintiffs to work. The third count alleged a conspiracy between this appellant and some of its officials and the local union and some of its officials to deprive the plaintiffs of their contractual rights, for which they asked compensatory and punitive damages. Another count was for a wage increase due to, but not paid to seven of the strikers, not here in issue.

At appellant's request the local United States Attorney initially undertook to defend the suits, but he withdrew, and appellant, upon being advised of the fact, engaged private counsel. We note the letter from the contracting officer to the appellant, 20 December 1952, reading in part, after reporting the withdrawal of the United States Attorney, as follows:

> "In view of the foregoing, it shall be necessary for you to retain private counsel to defend the litigation. It is imperative that immediate action be taken in this matter since there is now pending before the Court a motion for partial summary

judgment which has been adjourned due to the substitution of counsel from 19 December 1952 to 9 January 1953.

"The question of reimbursability of the cost and expenses of such litigation including judgments and court costs together with reasonable attorney's fees for private counsel shall be determined by the Contracting Officer at a later date."

An Executive Officer of the Corps of Engineers office followed this on 30 December 1952 with a reminder that the United States Attorney would not represent the appellant and that appellant's own attorney must be immediately retained. It was "reiterated that immediate action be taken * * * in this matter, if same has not already been done." The same statement as to future determination of reimbursability followed.

On 20 January 1953, the appellant asked whether the Government desired to furnish Government counsel to defend a third similar action that was commenced on 9 December 1952, and stated that if Government counsel were not furnished private counsel would be retained. The Government in reply referred the appellant to the letter of 30 December 1952.

To state the ensuing legal proceedings briefly, the appellant lost in the Superior Court of New Jersey, in the Appellate Division and in the Supreme Court of New Jersey, and paid in full the judgment of $38,245.81 with interests and costs. This judgment included both compensatory and punitive damages.

After the judgment of the Superior Court, the appellant asked the contracting officer for authorization to proceed with an application for a new trial. In reply to that letter

of 15 December 1953, the Authorized Representative of the contracting officer replied on 22 December 1953 that his office could not, at that time grant authority to take the proposed action. He promised that consideration would be given to reimbursability of the judgment and other expenses after conclusive determination of the litigation. Recommending that the appellant be guided by sound business and legal judgment, he concluded "This letter should not be construed as a direction * * * to refrain from taking any of the proposed legal steps referred to above."

Again on 15 March 1954, the Chief, Legal Branch, informed the appellant that "the question of reimbursement of any costs in connection with subject matter cannot be considered until after litigation has been conclusively determined."

Subsequently there was an appeal to the Supreme Court of New Jersey that does not seem to have been the subject of correspondence like the above.

A claim was submitted to the contracting officer for $75,660.39, which included legal fees and other expenses. The contracting officer denied the claim, which rests upon the above-quoted Article IV (1) (t) of the contract, for the following reasons:

1. Assessment of punitive damages establishes that the appellant maliciously and wilfully perpetrated a wrong upon the workers by refusal to recognize seniority rights.

2. Appellant flauntingly violated Article 1, paragraph 4, of the contract.

3. The litigation did not arise out of faithful performance of the contract.

4. The final determination of the court establishes that the appellant violated Appendix D of the contract.

The appellant appealed to the Corps of Engineers Claims and Appeals Board, and, upon receiving an unfavorable decision, appealed to the Secretary of the Army as authorized by the contract, Article IX, thereby vacating the decision of that Board. The appeal is timely, and is in the amount of $75,660.39 plus certain amounts as yet undetermined. We agreed to consider entitlement to reimbursement as a matter of principle without regard to the dollar amount involved.

Our problem may be simply stated: Has the appellant satisfied the Board, with evidence of record, that the decision of the contracting officer was erroneous? In an appeal attacking the validity of findings of fact or a decision by a contracting officer, not patently erroneous, it is incumbent upon the appellant to come forward with evidence showing error therein. In the absence of such evidence this Board cannot properly overrule the decision of the contracting officer. Appeal of *A. E. Ratner Chemical Co.*, ASBCA No. 474, 5 CCF 61113.

In support of its burden, the appellant has laid before us everything that was received by the Board below, the transcript of that hearing, briefs and arguments, and briefs with appendices presented on appeal to the Appellate Division and Supreme Court of New Jersey that were added to the file by agreement. We discount the briefs and arguments, for recital of a fact or an alleged fact therein is not evidence before the Board. Appeal of *Kobrin Box Manufacturing Co.*, ASBCA No. 455.

At the time the decision was made under the "Disputes" article, the contracting officer had before him a set of facts,

one of which was the judgment handed down against Dade Brothers, affirmed on appeal by the highest court, The Supreme Court of New Jersey. That was a fact that he could not ignore, and it translated into the meaning that punitive damages and compensatory damages had been imposed upon the appellant for a breach of contract and a conspiracy to deprive the plaintiffs of their contractual right to work. The contract involved in that suit was the union-management contract from which we quoted above and which the appellant was required by its contract with the Government to observe fully and faithfully. In view of the confirmed judgment of the New Jersey court, the contracting officer was completely justified in reaching his first, second and fourth reasons for denying the appeal. That set of reasons is the equivalent of a finding that the appellant wilfully breached its contract with the union and in the same act breached its contract with the Government. The remaining reason, i.e., that the litigation did not arise out of faithful performance of the contract, seems to flow necessarily from the others, for it would require the rarest of circumstances, as to which we are unwilling to conjecture, to transform a breach of contract into faithful performance of the contract.

The appellant has not shown us that the judgment does not exist nor that it is erroneous, nor that the appellant did not breach both the union contract and the Government contract, nor that when the acts that resulted in the litigation were committed the appellant was engaged in the faithful performance of its Government contract.

The appeal is denied.

Dated 30 April 1958.

Decision of Corps of Engineers Claims and Appeals Board, Etc.

DEPARTMENT OF THE ARMY

OFFICE OF THE CHIEF OF ENGINEERS

WASHINGTON 25, D. C.

BEFORE THE CORPS OF ENGINEERS CLAIMS AND APPEALS BOARD

Appeal of DADE BROTHERS, INCORPORATED Under Contract No. DA-30-347-eng-4	Eng C&A Board Decision No. 980

The appellant, Dade Brothers, Incorporated, has appealed to this Board for review of the contracting officer's decision denying its claim for reimbursement in the amount of $75,137.74 plus interest in connection with its operations under Cost-Plus-Fixed-Fee Contract No. DA-30-347-eng-4. The appellant has also submitted a further claim of $879.62 to cover costs of printing related to its appeal, and has indicated that other costs have been incurred which will be billed to the Corps of Engineers in accordance with standard operating procedure. The appeal was timely and a full hearing was accorded the appellant on 25-27 June 1956.

The contract, dated 1 January 1952, obligated the appellant for a fixed fee of $288,000 to operate Claremont Terminal in Jersey City, New Jersey and to perform packaging and processing services for shipment of equipment, materials and supplies to certain construction sites in North Africa and in Greenland. These services were estimated to cost $16,290,000, exclusive of the fixed fee. The

term of the contract was for a period of one year, but the undertaking was terminated for the convenience of the Government on 31 October 1952.

The New York—New Jersey waterfront has had a notorious history of labor unrest, and the operations at Claremont Terminal did not escape unscathed. From 24 June to 13 August there was a series of what has been categorized by the appellant as "wildcat" strikes, meaning strikes unauthorized by the Marine Warehousemen's Local No. 1478, an affiliate of International Longshoremen's Association. To understand the basis of the strikers' grievance, one must understand the practice in the New York waterfront area of hiring dock workers through utilization of the "shape-up" system. The most simplified form of the shape-up, as described in the Fourth Report of the New York State Crime Commission (Port of New York Waterfront), is as follows: When word goes out that dock workers are needed at a particular pier, they form in a large semicircle around the hiring boss, who selects the men he wishes to hire and "blows the whistle." The men who are hired then file onto the pier; those not hired drift away. At active piers there has also developed the system of hiring the gang as a unit at the shape-up. The composition of the gang when this method is used is customarily determined by the gang boss and is normally a group accustomed to working together as a team. It appears from the testimony that both systems were employed at Claremont during the life of the contract.

The shape-up at Claremont was complicated, however, by a Union Agreement with Dade containing a promise that "Employees shaping regularly for each company shall

be entitled to employment in work for which they have the necessary qualifications in order of their seniority with the company." It was the strikers complaint that the seniority rights to which they were entitled under the Union Agreement with Dade were being systematically ignored by both Dade and the Union, and that persons with less seniority were being given preference in employment by the hiring boss. In an effort to resolve the dispute, officials of Jersey City had a series of meetings with the so-called insurgents, with Dade and with the Union officers. These meetings culminated in a written but unsigned agreement providing among other things for submission of the problem to arbitration, and specifying "Return of the men to work immediately, with insurgent members to be absorbed as soon as possible."

The American Arbitration Association, after hearing, issued a decision holding that the strikes were unauthorized, that the strikers had been deprived of this seniority by the Union because of the unauthorized strikes, and even though the conduct of the strikers may have been without justification, the loss of seniority was improper and could not be sustained. The award in arbitration was that the strikers did not lose their seniority. The date of this award was 22 September 1952. During the period the dispute had been in arbitration the strikers continued to be denied seniority in the shape-up, the appellant contending that such seniority was waived by the strikers pending the outcome of the arbitration.

Thereafter, three groups of strikers initiated in the latter quarter of 1952 separate lawsuits against Dade,

the Union, certain officers of Dade, and certain officers of the Union. In such suits the strikers sought to recover from the defendants compensatory damages for wages lost by non-employment in violation of seniority rights, and punitive damages suffered because of what the complaint termed a "conspiracy" between the defendants Dade and the Union and the officers of each "to unlawfully and illegally deprive the plaintiffs of their lawful rights under the contract hereinabove mentioned and to deprive them of a right to earn a living, greatly injuring and damaging the plaintiffs."

At the request of the appellant, the contracting officer arranged for the United States Attorney to defend the suits on behalf of Dade. Thereafter, however, the United States Attorney withdrew, the contracting officer advised the appellant thereof, and the appellant retained private counsel.

The issues came to trial before a judge and jury in the Superior Court of New Jersey at Jersey City, during 23 November—23 December 1953, culminating in a verdict in favor of the plaintiffs and against both Dade and the Union for compensatory damages in the total amount of $25,841.60 representing the actual loss of wages suffered and also punitive damages in the gross amount of $8600 or $200 for each plaintiff. The verdict as handed down by the jury was returned against Dade and the Union only, and did not mention the individual defendants, officers of Dade and the Union. The Clerk of the Court entered judgments of "no cause of action" against these individual defendants, but the Appellate Division of the Superior Court remanded the cause to the Trial Court for

correction of the judgment. This was done, so that the final judgment is against Dade and the Union and is silent as to any verdict against the individual defendants.

Coincidentally with the procedural correction of the judgment, Dade appealed the substantive judgment to the Appellate Division, where the decision of the Trial Court was affirmed by a per curiam opinion, the text of which is appended hereto for ready reference as Appendix A. Pertinent aspects of this opinion will be considered later in the body of the decision. After affirmance in the Appellate Division, Dade obtained certification (analogous to certiorari) from the Supreme Court of New Jersey, where upon review the judgment was again affirmed without opinion.

After affirmance of the judgment against it, which Dade paid in full because of what appears to have been an empty Union Treasury, appellant on 25 May 1955, submitted a claim to the contracting officer for reimbursement of $75,660.39, or $38,245.81 for judgment with interest and costs, and $37,414.58 for legal fees and other expenses.

The appellant based its claim on what it terms the clear and unequivocal language in Article IV (1) (t) of the Contract, which states as follows:

> t. In the event the Contracting Officer shall determine that the best interests of the Government require that the Contractor initiate or defend litigation in connection with claims of third parties arising out of the performance of this contract, the Contractor will proceed with such litigation in good faith and the cost and expense of such litigation, including judgments and court costs, allowances

rendered or awarded in connection with suits for wages, overtime or salaries, and reasonable attorney's fees for private counsel when the Government does not furnish Government counsel, shall be reimbursable under this contract.

By decision dated 26 October 1955 the contracting officer ruled that appellant was not entitled to be reimbursed the amount of the judgment and legal expenses related thereto. His denial was predicated on the following reasons:

1. The assessment of punitive damages establishes that Dade maliciously and willfully perpetrated a wrong upon each of the plaintiffs by refusing to recognize seniority rights as established by the Union Agreement. A verdict for punitive damages indicates that the defendant maliciously and wantonly agreed to perpetrate and to commit a tort and did so.

2. The appellant violated Article I (4) of the contract, requiring the contractor to faithfully administer the contract, carefully recruit, furnish, supervise and maintain an adequate force of competent and dependable employees, and perform all other managerial and administrative services reasonably required under the contract.

3. The litigation did not arise out of the faithful performance of the contract within the meaning of the aforequoted Article IV (1) (t), and consequently there was no obligation on the part of the contracting officer to reimburse appellant the amount of the judgment and expenses.

4. The final determination by the Court conclusively established that the appellant willfully and wantonly vio-

lated Appendix D, which in pertinent part provides as follows:

1. *Manual Employees:*

a. The Contractor will abide by all the terms and conditions of the Union Agreement with the following groups of employees.

* * * * *

2. The Marine Warehousemen's Local affiliated with the International Longshoremen's Association covering warehouse employees.

Upon receipt of this adverse decision, appeal was made to this Board.

The appellant argues that under the terms of its contract with the Government, particularly the above-quoted Article IV (1) (t), it is entitled to full reimbursement for all costs and expenses of litigation, that the action was one for lost wages arising out of the performance of the contract, and that the arbitration award established that the penalty of deprivation of seniority was imposed by the Union and not by the appellant. Further, it is contended that the decision of the contracting officer had no substantial basis in law or in fact, that at the hearing before this Board no evidence was introduced by the Government in support of its findings, and that the fact that a verdict for punitive damages was handed down against the appellant does not establish that appellant violated the contract, noting at the same time that there was no finding of punitive damages against the individual employees of the appellant. In the absence of such a finding, argues the appellant, there can be no conspiracy.

Appellant insists also that irrespective of the adverse verdict, it is entitled to reimbursement for its legal fees and necessary costs, based on previous rulings of other administrative agencies of the Government. In connection with this point the appellant asserts that the Appeal of *Robertson Aircraft Corporation,* Army BCA 1241 (1948), which was relied upon by the contracting officer in his Findings of Fact, is clearly distinguishable. The Robertson appeal reviewed a decision by a contracting officer denying reimbursement to the contractor for legal fees and expenses incurred by Robertson in settling damage suits growing out of the crash of a glider constructed under a CPFF Contract. The crash occurred while the glider was being demonstrated at request of the appellant, and the Army Board of Contract Appeals had determined that the crash was due to a negligent inspection by Robertson of defective parts, and constituted a breach of contractual warranty as to materials and workmanship. Insofar as reimbursement of legal fees and expenses were concerned, the Board ruled that tort claims otherwise payable are not reimbursable to the contractor when the cause of action on which the claims are based arises from a breach of a contractual duty.

Finally, appellant believes that since the Corps of Engineers was fully cognizant of the labor difficulties besetting Dade, resulting in the New Jersey suit, and allegedly approved appellant's action, the Government has waived its right to contest reimbursement of the amounts in question. In support of this premise Dade relies on the testimony of the contracting officer before certain Congressional Committees investigating racketeering and

port security on the New York—New Jersey waterfront where it is contended that the contracting officer admitted that he had knowledge of the labor problems at Claremont Terminal and that he had power to fire the troublemakers. From these admissions, appellant concludes that the contracting officer "waived all defenses when he neglected to take action or ordered the appellant to take action against the proper parties."

In its turn the Government takes the position that the entire litigation against Dade resulted from and was predicated upon acts of the contractor which constituted a breach and nonperformance of its contract. In this connection the Government makes reference to the previously mentioned requirement of Appendix D of the contract that the contractor abide by the terms of its Union Agreements, argues that the finding of the New Jersey Courts in awarding punitive damages necessarily involved a determination that Dade's violation of the Union Agreement was "malicious, wanton, and willful," and proposes that the judgments of the courts are determinative of the issues here involved. The Government also denies that it waived or altered Dade's obligation to comply with the Union Agreement or that it had any knowledge of a conspiracy between the Union and the contractor to deny seniority to the striking members of the Union. Nor does the Government view the testimony adduced at the hearings held by the New York State Crime Commission and by the Congressional Committees as sufficient to establish any basis to relieve the contractor of its obligations under the contract. The Government does not deny that there were criminal and other undesirable elements present on

the waterfront, but points out that before Dade entered into the contract here involved, it had operated at Claremont Terminal and must be presumed to have known of the conditions there existing.

The Government further contends that under the previously quoted Article IV (1) (t) reimbursement is limited to the costs of such litigation as resulted from the performance of the contract, and that the litigation in issue did not arise from performance of the contract, but rather from the appellant's malicious, wanton and willful violation thereof. And as a final point the Government asserts that none of the actions taken by the contracting officer with respect to the litigation constituted a waiver of the Government's right to withhold reimbursement. This argument has reference to appellant's contention that the contracting officer, when the United States Attorney withdrew, ordered the appellant to defend subject litigation and retain private counsel, and that thereby reimbursement of the costs of such litigation became mandatory under the contract. The Government denies that it ordered appellant to retain private counsel, but merely pointed out the necessity for such counsel as a normal step. In any event, says the Government, the contractor was clearly advised that the question of reimbursability of the cost of the litigation would be determined at a later date.

At the hearing the appellant relied primarily on the testimony of E. Treverton Clark, Executive Vice President of Dade Bros., Inc., who had been in charge of operations at Claremont Terminal until June 1951, and who had been succeeded by James H. Cissel, Terminal Manager.

It was Cissel, along with a Hugh E. McGill, who had been named along with Dade and the Union as defendants in the New Jersey litigation. The Government produced no witnesses, being content to allow the existing record guide the deliberations of this Board, but both parties stipulated to make a part of the record before this Board, along with certain pertinent correspondence, the pleadings, judgments, transcript and appeal proceedings before the New Jersey Courts. All of this material has been considered by this Board in reaching its decision.

DECISION

There are many decisions holding that the costs of judgments and attorney fees and other expenses incidental to litigation are reimbursable under a CPFF contract when incurred in the performance of the contract work and where they were rendered relative to a matter in which there was no conflict between the interests of the contractor and the Government. *Hayden Chemical Corporation,* BCA No. 1758; *Packard Motor Car Company,* ASBCA No. 81; *Hubbell & Miller Company,* ASBCA No. 1111; *Olin-Mathieson Chemical Corporation,* ASBCA No. 2568. And contrariwise, where the evidence has indicated that the expenditure did not arise in the performance of the contract, there has been no reluctance to deny the contractor reimbursement of the amounts involved. *Douglas,* BCA 851; *General Electric Company,* ASBCA 1004; *Robertson Aircraft Corporation,* BCA No. 1241.

In the instant case the expenses for which reimbursement is sought arise directly from the New Jersey litiga-

tion, and accordingly must be evaluated within such frame of reference. Fundamentally, the New Jersey litigation constituted a suit to recover compensatory and punitive damages resulting from a tortious and malicious interference with the right to work. These are not the words of this Board; they are the words of the Appellate Division of the Superior Court of New Jersey. The Appellate Court noted the plaintiff's claim that their seniority rights were being ignored at the morning shape-ups by the hiring boss with the consent and cooperation of Dade, and concluded that there was ample proof before the trial court to warrant a finding by the jury that the employer and the Union acted in concert in willfully and maliciously interfering with plaintiff's right to employment under the collective bargaining agreement.

Thus it is established by the New Jersey Courts that Dade, as well as its Vice President Cissel and its Labor Relations Manager McGill, was guilty of the tortious conduct of entering into a conspiracy with the defendant Union to deprive certain Union members of their seniority rights under the Union Agreement. But appellant has asserted that the decision of the New Jersey Courts is not res judicata as to the issues before this Board, and has introduced testimony in contradiction of the findings of such courts. We must agree of course that the New Jersey decision is not in any formal sense res judicata as to the dispute before this Board. The parties are distinct and the issue is different. This, however, is not conclusive of the problem. Although as already indicated the appellant has offered to this Board some testimony contrary to the findings of the New Jersey Courts, there

has been generally no tendency to retry here the issues there considered. This is due as much to a tacit recognition of the impossibility of duplicating before an administrative board of this nature an extensive trial before a judge as it is to appellant's insistence that notwithstanding the outcome of the New Jersey litigation, the appellant is entitled to reimbursement under its contract.

In *Appeal of Lennox Metal Manufacturing Company, Inc., ASBCA No. 2453*, the Armed Services Board considered an appeal from a contracting officer's decision terminating a contract for default. In a previously determined independent action initiated by the Government to recoup certain partial payments and to acquire title to property which presumably had vested in the Government under the partial payments clause, with counterclaim by Lennox for damages because of breach of contract, the trial court found inter alia that the termination of the contract for default had been erroneous and a breach of contract by the Government. The trial court decision was affirmed by the Second Circuit Court of Appeals. *United States* v. *Lennox Metal Manufacturing Company*, 131 F. Supp. 717 (E.D. N. Y. 1954), aff'd, 225 F. 2d 302 (2d Cir. 1955). The Armed Services Board held that it was bound by this finding. Similarly, this Board here concludes that it is bound by the decisions of the New Jersey Courts insofar as necessary to determine that the claim now before us for reimbursement of judgment costs, attorney fees and other litigation expenses arose directly from a suit in which the New Jersey Courts found that the appellant engaged willfully and maliciously in a con-

spiracy to deprive certain individuals of their seniority rights under the collective bargaining agreement.

This does not dispose of the matter. This Board must consider whether irrespective of the above finding, appellant is nonetheless entitled to reimbursement under the contract. We think that it is not so entitled. We are persuaded not only by the authority of the *Robertson Aircraft Corporation* decision, BCA No. 1241 but equally by the compulsion of logic that a contractor who commits a malicious and willful tort in derogation of the contract provisions cannot be said to be in the commission of such tort acting within the framework of the contract within the meaning of Article IV (1) (t) aforequoted. In other words, the conspiracy cannot be considered as arising out of the performance of the contract; it was an act beyond the intendment and beyond the scope of the contract. Not only was the conspiracy in direct derogation of the injunction placed upon the appellant by Appendix "D" to abide by all of the terms and conditions of the Union Agreement, but it was equally violative of the labor policy of the Government as expressed in the National Labor Relations Act. It would be unreasonable to hold that the contract requires the Government to reimburse a contractor for the litigation costs arising out of willful and malicious action not only violative of the rights of third parties but in contradiction to the very terms of the contract itself. Potent support for this view is found in *Appeal of Douglas Aircraft Company, Inc.*, BCA No. 851, where the Army Board in denying a claim for reimbursement of legal costs incurred in a *successful* defense of an alleged tortious theft of a patented procedure for cover-

ing the fuselage of aircraft, which patent was being used in the manufacture of planes under the very CPFF contract against which reimbursement was sought, stated that "the wrongful act, whether committed or not, charged by the employee, was no part of the performance of the contract and had no relationship to the performance of the contract," that the defense of the lawsuit was "merely coincident with the performance of the contract—it occurred during the time of the performance of the contract, not because of the performance of the contract," and that the defense of the lawsuit was not incident to and necessary for the performance of the contract. The Army Board then concluded with the following quoted passage:

> "Strange, indeed, would be a Government policy which would permit any person, firm or corporation, merely because it is a party to a Government CPFF Contract, thereby to be inoculated from the risks and vicissitudes of conducting business, or even of existing. Any person, firm or corporation is liable, at any time, to be brought into court upon false charges. The fact that such person, firm or corporation may, at such time, be engaged in the performance of a Government CPFF Contract does not create a right in that person, firm or corporation to be defended, or reimbursed for the cost of such defense, by the Government, unless it is affirmatively shown that such defense and expenditure were incident to or necessary for the performance of that contract."

In reaching its conclusion, this Board is aware of the decisions of the Comptroller General of the United States

holding that a CPFF contractor is entitled to be reimbursed for damages or loss occasioned by the negligence of its employees, save in those instances where the management was itself negligent in hiring the negligent employee. 21 Comp. Gen. 149; 22 Comp. Gen. 948; 23 Comp. Gen. 467. But in the case presently before this Board we are not dealing with negligent conduct but with conduct found by the Courts to be willful and malicious, nor are we dealing with the acts of minor employees, but with the torts of a Vice President and a Labor Relations Manager, both representatives of top management. We think the decisions of the Comptroller General are clearly distinguishable from the case before us.

Finally, this Board rejects the argument that the Government by knowledge of labor conditions at the waterfront or by tacitly consenting to the hiring of private counsel waived its right to deny reimbursement to the appellant. In the first place, there has been no evidence or even any allegation indicating that the contracting officer was aware of or had reason to be aware of the existence of the conspiracy found by the New Jersey Courts. The most that can be said is that the contracting officer knew generally of the labor conditions at the waterfront, but that is a far cry from knowledge of conspiracy. As for the action of the Government in consenting to the hiring of private counsel, such action seems to us to be completely consistent with normal procedure, particularly when the appellant denied the acts for which the court ultimately imposed liability. And even here the correspondence clearly indicates that the Government did not

promise reimbursement, but specifically stated that reimbursability of litigation costs and attorney fees would be determined upon the outcome of the litigation. As this decision has indicated, such a position was discreet.

For all of these reasons, this Board concludes that appellant is not entitled to be reimbursed for the costs of defending the New Jersey litigation or for the judgment costs in connection therewith and this appeal must be and it is hereby DENIED.

Date: 4 April 1957

Opinion of Superior Court of New Jersey Appellate Division

A 248-53

Per Curiam.

Plaintiffs here, 43 in number, sued their employer, Dade Bros., Inc., and certain of its employees, and the Marine Warehousemen's Local No. 1478 and certain officers of the union to recover compensatory and punitive damages which they claimed to have suffered because of a tortious and malicious interference with their right to work. The jury awarded each of them compensatory damages representing the actual loss of wages suffered and also punitive damages in the amount of $200. The awards were against Dade Bros., Inc., and the Local; no verdict was returned against the individual employees and officers of the employer and the union. Although the issue of the liability of the individuals was submitted to the jury for determination along with that of Dade Bros. and the Union, the jury was silent as to them. An appeal by Dade Bros. followed.

When the matter was first presented to us we noted in the appendix that although no verdict had been rendered against the individuals, a judgment of no cause of action as to them had been entered against the plaintiffs. It was impossible to determine from the record whether such a judgment had been entered at the direction of the trial court or whether a clerical error had been made in recording the verdict. Consequently, the cause was remanded so that a motion could be made to correct the record. Such a motion was made, as the result of which an amendment was entered striking out the judgment of no

cause of action in favor of the individual defendants and setting forth the true fact that the verdict was silent as to them. The matter has now been returned to us for decision on the merits of the appeal.

The first point argued is that the verdict was contrary to the weight of the evidence. A motion for a new trial on that ground was presented to the trial court and denied and the rules tell us that we should not alter that result unless, after having given due regard to the opportunity of the trial court and the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that the verdict was the result of mistake, partiality, prejudice or passion. R.R. 1:5-3(a).

The record discloses that plaintiffs were warehousemen in the employ of Dade Bros., Inc. at the Claremont Terminal, waterfront pier in Jersey City. They were members of the defendant labor union, which had a collective bargaining contract with the employer. Under that contract the employees had certain seniority rights.

Apparently the men employed on a day to day basis. They would assemble or "shape up" on the pier each morning and an employee of Dade Bros., known as the hiring boss, would make individual selections among the men until the required number for the day was reached. The hiring boss was the defendant, Augustine De Acutis, also a member of the union and for part of the period involved president thereof. Originally he was engaged as a stevedore and later he became hiring boss, a position he held for about eighteen months until the Terminal closed on October 31, 1952.

De Acutis was active in the union, which apparently was in the throes of internal dissension arising out of his conduct as hiring boss. The plaintiffs claimed that their seniority rights to employment under the contract were being ignored at the morning shape-ups by De Acutis with the consent and cooperation of the employer. Dade sought to take the position at the trial that De Acutis was designated hiring boss by the union and that it had no control over his activities. However, without detailing the evidence, a clear factual issue on this subject was presented for determination by the jury.

In any event on June 24, 1952, because of alleged indiscriminate hiring without regard to length of service and for other grievances connected with contract benefits, the aggrieved warehousemen struck. The strike lasted one day, when according to the plaintiffs an oral agreement was reached to remedy the conditions and they returned to work.

However, the next day at the shape-up the agreement was ignored and on June 26th, 158 warehousemen struck and engaged in picketing until July 7th. During this period plaintiffs asserted that the employer agreed with their committee to prepare and post a seniority list to be followed. Proof was introduced to demonstrate that this and other promises made were not fulfilled and that there continued to be a disregard of seniority. The result was that the men walked out again on July 24th and resumed picketing.

Evidence was introduced to show that during the early part of this picketing, the employer through its representatives, and particularly the vice president in actual

charge of the pier operation, stimulated and activated a situation between the non-strikers and the picketers which led to a serious commotion and near riot and which might have ended in a large scale physical affray if it were not for the substantial efforts of the local police. In this connection a captain of the Jersey City Police Department said:

> "So when I heard the men marching out, I went over to Mr. Cissel (Vice President and General Manager of Dade), who was standing by there, maybe about twenty-five or fifty feet away from the picket line, and I told him, 'Do you know these men of yours are marching out on this picket line?' I said, 'If there is any bloodshed here, you are going to be arrested for inciting a riot.' So he laughed and said, 'Well, I guess I'll have to hire a lawyer.' With that I notified Deputy Chief McLaughlin that there was going to be trouble, and he immediately responded." (Insertion ours.)

Thereafter, on August 5th, a conference was held between the committee of the strikers and representatives of the union, with representatives of the employer in attendance. At this meeting one Connolly, a vice president of the International Longshoremen's Association, said to the committee: "You'se fellows is out. Those loyal men are going to work and you is out." This broke up the meeting and the strikers resumed picketing.

In addition to the picketing, the strikers instituted an injunction suit in the Chancery Division of this court against the International, the Local union and certain of their officers, including Connolly and DeAcutis.

Opinion of Superior Court of New Jersey, Appellate Division

Public officials of Jersey City having interested themselves in the affair, further conferences were held at the City Hall at which company, union and insurgents were present. Finally on August 13th an agreement was reached and a written but unsigned memorandum made of the terms thereof.

Under this memorandum among other things "the entire dispute" was to be submitted to independent arbitration. The specific nature of the dispute was not described but plaintiff contended that it related to the seniority question. In listing the matter agreed upon, paragraph 4, said, "Return of the men to work immediately, with insurgent members to be absorbed as soon as possible."

At the trial, the Dade Bros., contended that the concord signified by this paragraph was that pending the arbitration all of the "loyal" men who had not gone on strike would be employed first, regardless of seniority, and that when they were taken care of the strikers would be hired as the need arose. And it further claimed that the strikers agreed to waive seniority until the arbitration ended.

The strikers claimed that the agreement was, and that paragraph 4 was intended to indicate, that all men were to return to work immediately, with the insurgents absorbed in the day to day hiring on the basis of seniority. And they claimed with much force that they would not have agreed to withdraw their picket line and give up or waive, pending the arbitration, the very thing which they had been struggling to enforce, i.e., their seniority rights.

As to this the trial court held, and we concur in his view, that the language of the paragraph was ambiguous and

that the jury should decide on the basis of the proof what the agreement between the parties was in fact.

Plaintiffs' proof shows that Dade Bros. did not hire through DeAcutis, the hiring boss, according to seniority between August 15 and September 22nd, the date of the rendition of the arbitrator's decision. In fact, Dade's brief on this appeal says that it "concedes that plaintiffs would have been entitled to employment during the period August 15th to September 22, 1952, by virtue of seniority, if there had not been a waiver of such seniority." Of course, the verdict of the jury must be taken as a finding that no such waiver was made.

The arbitration hearings were held on September 3rd and 9th, 1952, at which, according to the arbitrator, the sole issue submitted was whether the action of the union in depriving the strikers of their seniority for what the union called an unauthorized strike was proper. The written decision of the arbitrator rendered on September 22nd was to the effect that the action was improper and that the deprivation of seniority could not be sustained.

Plaintiffs offered proof tending to show that, despite this decision, the hiring boss and the company, with few exceptions, continued to ignore their seniority rights thereafter and down to October 15, 1952, the last date for which the plaintiffs claim compensation.

Dade argued that plaintiffs engaged in wildcat strikes without authorization of the union and in violation of the management-union collective bargaining agreement which established machinery including arbitration for the handling of disputes. However, the jury must have regarded it as significant that Dade never undertook to discharge

the plaintiffs, which manifestly would have been its right if there was no basis for the charges of unfair labor practices with regard to seniority and if the strikers were illegal.

In any event, testimony was offered indicating that neither the union nor the employer's representatives would listen to the grievance complaints of these men, despite the fact that the vice president in charge of the operation conceded he had complaints that De Acutis "took extreme and brutal discriminatory disciplinary action." One witness said that both the company and the union laughed and sneered at their grievances. And there was evidence that the men were shunted back and forth between the union and the employer's officials, accomplishing nothing with respect to vindication of their claims. Another plaintiff said that one of two Dade representatives was always present at the shape-up. When De Acutis ignored his seniority in hiring the men for the day and he complained to these company men, he got nowhere. It appeared, however, that when the company's warehouse superintendent wanted a man put on, he said to De Acutis: "I am putting this man on to-day," and it was done.

There was much dispute in the testimony, the employer's position being that it was the innocent victim of dissension within the union. However, there was ample proof to warrant a finding by the jury that the employer and the union acted in concert in wilfully and maliciously interfering with plaintiffs' right to employment under the collective bargaining agreement. *Kuzma* v. *Millinery Works, etc. Local 24*, 27 N. J. Super. 579 (App. Div. 1953).

Opinion of Superior Court of New Jersey
Appellate Division

Our appraisal of all of the proof made in the light of the basic rule that due consideration must be given to the opportunity of the trial court to see and hear witnesses, has led us to the conclusion that the action of the jury was not contrary to the weight of the evidence.

When the matter was before us originally, the argument was made that the judgment of no cause of action in favor of the individual defendants required the setting aside of the judgment against the employer, Dade Bros. The theory was that since its responsibility was predicated upon the doctrine of respondent superior, a finding exonerating the employees established a like immunity in their employer. If the record had remained in that state, this position would have been sound. *Kelley* v. *Curtiss and City of Newark,* N. J. (October 11, 1954).

However, as the result of the remand the error in recording the judgment has been corrected. The true situation now appears in the amended judgment, namely that no verdict at all was rendered against the employees. Dade continues to argue that even as now entered, the absence of verdict against the individual actors is so inconsistent with a verdict against their employer that the present judgment must be reversed. But this does not follow. In such a situation, the rule is that the action against the employees stands as if it had never been tried; the status is the same as if a mistrial had occurred as to them. *Dunbaden* v. *Castles Ice Cream Co.*, 103 N. J. L. 427 (E. & A., 1927). That this is the proper result is obvious. The action could have been instituted originally against Dade Bros. alone, charging a liability derived from the

acts of its employees. It was not necessary to recovery that the employees be joined at all. The rule as to the employer's liability would be the same.

It must be assumed from the charge of the court and the fact of the verdict against the employer that the jury found the employees as representatives of their employer, guilty of the tortious conduct complained of. The fact that the personal liability of the employees was not declared by way of individual judgments against them, for some unexplained reason, should not and does not vitiate the declaration of the employer's responsibility.

The other grounds of appeal urged have been considered and found to be without the substance required for reversal.

The judgment is affirmed.

Letter Opinion of Contracting Officer

DISTRICT ENGINEER
EASTERN OCEAN DISTRICT
CORPS OF ENGINEERS
346 BROADWAY
NEW YORK 13, N. Y.

REGISTERED MAIL
RETURN RECEIPT REQUESTED

NAELA

Oct 27 1955

Re: Dade Brothers, Inc.—Contract No. DA-30-347-ENG-4—Litigation of Todd, O'Brien, Bryant et al vs. Dade Brothers, Inc.

Dade Brothers, Inc.
c/o James H. Cuddihy, Esq.
11 West 42nd Street
New York, New York

Gentlemen:

Reference is made to above subject contract entered into between Dade Brothers, Inc., and the United States of America on 1 January 1952. The Contract provided for the Contractor to receive and process materials at Claremont Terminal, Jersey City, New Jersey, for overseas shipment.

By letter, dated 25 May 1955, the Contractor advised this office that the Supreme Court of the State of New Jersey had affirmed adverse lower court decisions in subject litigation and requested reimbursement of the judgment, interest, court costs, legal fees and related expenses

pursuant to Article IV, paragraph 1, subparagraph (t) of the contract. To date, the Contractor's total claim for reimbursement is the sum of $75,660.39.

It is the determination of the Contracting Officer that in the performance of subject contract, the Contractor has failed to faithfully comply with the terms of the contract as indicated in the attached Findings of Fact in support of this determination. Accordingly, the request by the Contractor for reimbursement of the total amount of $75,660.39 is disapproved, except that the Contractor will be reimbursed for the sum of $522.65 which represents reasonable counsel fees and disbursements payable to John E. Keale, Esq., in connection with the fringe benefit phase of subject litigation.

You are advised that the foregoing constitutes the final decision of the Contracting Officer. Your attention is invited to Article X of the Contract entitled "DISPUTES", whereby you may appeal this decision to the Chief of Engineers within thirty (30) days after receipt of this decision. If appeal is taken, same should be processed through this office to facilitate action thereon.

1 Incl
Findings of Fact

Very truly yours,

MORTON SOLOMON
Colonel, Corps of Engineers
Contracting Officer

Contracting Officers' Findings of Fact

NAELA

SUBJECT: Dade Brothers, Inc.—Contract No. DA-30-347-ENG-4-Litigation of Todd, O'Brien, Bryant et al vs. Dade Brothers, Inc.—Findings of Fact.

1. Cost-Plus-A-Fixed-Fee Contract No. DA-30-347-ENG-4 was entered into under date of 1 January 1952 between the United States of America, hereinafter called the Government, and Dade Brothers, Inc., hereinafter called the Contractor. The Contractor was to furnish all labor, material, equipment, supplies and accessorial services not furnished by the Government, and do all matters and things necessary to receive, unload, reload, identify, dismantle, mark, warehouse, store, guard, preserve, pack, stencil, process for export shipment, and deliver to dock alongside steamer or aboard scow or lighter, with transportation thereof to piers in the New York metropolitan area, all construction equipment, materials and supplies, which the Government or its contractors may tender, f.o.b. land or water carrier, to the Contractor at Claremont Terminal, Jersey City, New Jersey, for shipment to overseas projects under the jurisdiction of the Corps of Engineers, Department of the Army.

2. Said contract was terminated for the convenience of the Government effective 31 October 1952.

3. On 21 October, 10 November, and 9 December 1952, three separate lawsuits were instituted against Dade Brothers, Inc., Marine Warehousemen's Local No. 1478, Vincent Brown, Augustine DeAcutus, Anthony Piscopo, James Cissel and Hugh E. McGill, in Hudson County Court, Jersey City, New Jersey. Each lawsuit set forth

the following separate basic causes of action for monetary damages:

a. Fringe benefits.

b. Conspiracy to deprive employees' seniority rights established by the union.

4. At the request of the Contractor, the United States Attorney for the District of New Jersey was assigned to defend said actions. By letter EOHVL, dated 20 December 1952 (Exhibit 1), the Contractor was advised that the United States Attorney was withdrawing from the defense of said Litigation and to make the necessary arrangements for the substitution of private counsel. The last paragraph of said letter states as follows: "The question of reimbursability of the cost and expenses of such litigation, including judgments and court costs, together with reasonable attorney's fees for private counsel shall be determined by the Contracting Officer at a later date".

5. The Contractor advised this office that John E. Keale, Esq., of 921 Bergen Avenue, Jersey City, New Jersey, had been retained to undertake the defense of said litigation.

6. The plaintiffs obtained summary judgment for the fringe benefit causes of action, 3a above, and Dade Brothers paid and was reimbursed for said judgments. John E. Keale, Esq., submitted a bill dated 16 February 1953 to the Contractor in the amount of $650.00 for professional services rendered to date and disbursements of $176.23. The Contractor was authorized to pay Mr. Keale on a reimbursable basis the sum of $153.58 for disbursements.

Contracting Officers' Findings of Fact

With respect to the unpaid balance of $650.00 (attorney's fees) and $22.65, disbursements not previously reimbursed, the Contracting Officer has determined that $500.00 is a fair and reasonable fee. Accordingly, the Contractor is authorized to pay Mr. Keale said sum, in addition to $22.65 disbursements, on a reimbursable basis.

7. Thomas J. Brogan, Esq., of 15 Exchange Place, Jersey City, New Jersey, was retained as associate counsel with Mr. Keale to conduct the defense of subject litigation. The Contracting Officer was not formally advised nor did he authorize the retainer of Mr. Brogan. The agreement between Messrs. Keale, Brogan and Dade Brothers has never been furnished to this office and separate bills for services rendered have been submitted by each attorney.

8. The three actions in paragraph 2 above were consolidated for trial purposes.

9. Trial by jury was had and on 10 December 1953 a verdict was returned in favor of the plaintiffs against Dade Brothers and Marine Warehousemen's Local No. 1478 awarding compensatory damages in the amount of $25,841.60 and punitive damages in the amount of $8,600.00. On 31 December 1953, judgment in the total amount of $34,441.60 was entered against Dade Brothers and the union. The complaint against the other defendants was dismissed.

10. By letter, dated 15 December 1953, Dade Brothers forwarded to the Contracting Officer a letter from its attorney dated 14 December 1953 (Exhibit 2). The Contractor recommended that an appeal be taken from the adverse verdict and requested instructions from this office.

Contracting Officers' Findings of Fact

By letter EOHLA dated 22 December 1953 (Exhibit 3), the Contractor was advised that authorization for an appeal could not be granted at that time and the Contractor was cautioned to be guided by sound business and legal judgment. The Contractor was also reminded that the question of reimbursement of subject litigation would be determined at the conclusion thereof. Thereafter, an appeal was effected from said judgment.

11. On 8 November 1954, the Contractor advised the Contracting Officer that the Appellate Division of the Supreme Court of the State of New Jersey had affirmed the judgment of the Superior Court on 5 November 1954 (Exhibit 4). The Contractor further advised that it had instructed Mr. Brogan to initiate an appeal to the Supreme Court of the State of New Jersey. The Contractor effected an appeal to the Supreme Court without requesting or receiving authorization to do so from the Contracting Officer.

12. On 25 May 1955, the Contractor advised the Contracting Officer that the Supreme Court of the State of New Jersey had affirmed the judgment of the trial court (Exhibit 5).

13. The Contractor has requested reimbursement in connection with subject litigation under Article IV (t) of the prime contract for the following:

a. Judgment, interest and costs—$38,245.81.

b. All legal fees and other expenses related to the litigation in the total amount of $37,414.58 as indicated by Exhibits 6, 6a and 6b.

Contracting Officers' Findings of Fact

14. It is the determination of the Contracting Officer that Dade Brothers, Inc. is not entitled to be reimbursed, as requested under Article IV, paragraph 1, subparagraph (t) of the basic contract, for the judgment and litigation expenses set forth in the preceding paragraph for the following reasons:

a. In addition to compensatory damages, punitive damages in the amount of $200.00 for each of the forty-three plaintiffs were assessed against Dade Brothers and Marine Warehousemen's Local No. 1478. The assessment of punitive damages establishes that Dade Brothers maliciously and wilfully perpetrated a wrong upon each of the plaintiffs in subject litigation by its refusal to recognize the seniority rights as established by the union agreement. Generally, a verdict for punitive damages is justified when it is determined that the defendant maliciously and wantonly agreed to perpetrate and to commit a tort and did so.

b. The Contractor flauntingly violated Article I, paragraph 4 of the contract which provides that "The Contractor, upon the responsibility of its corporate officers, shall (1) faithfully and diligently administer performance of this contract; (2) carefully recruit, furnish, supervise and maintain an adequate force of competent and dependable employees; . . . (5) do and perform all other administrative and managerial services reasonably required to perform, with diligence and dispatch, all obligations of this contract".

c. Subject litigation did not arise out of the faithful performance of the contract as provided in Article IV, paragraph 1, subparagraph (t) of the contract which provides as follows:

Contracting Officers' Findings of Fact

"In the event the Contracting Officer shall determine that the best interests of the Government require that the Contractor initiate or defend litigation in connection with claims of third parties *arising out of the performance of this contract*, the Contractor will proceed with such litigation in good faith and the cost and expense of such litigation, including judgments and court costs, allowances rendered or awarded in connection with suits for wages, overtime or salaries, and reasonable attorney's fees for private counsel when the Government does not furnish Government counsel, shall be reimbursable under this contract". (Emphasis supplied.)

d. The final determination by the Court conclusively establishes that the Contractor wilfully and wantonly violated Appendix D, paragraphs 1a and 1a2 which provide as follows:

"1a. The Contractor will abide by all the terms and conditions of the Union Agreement with the following groups of employees".

"1a2. The Marine Warehousemen's Local affiliated with the International Longshoremen's Association covering warehouse employees".

15. In view of the foregoing, the Contractor's request for reimbursement has been denied except to the extent indicated hereinabove.

MORTON SOLOMON
Morton Solomon
Colonel, Corps of Engineers
Co .racting Officer

Dated: 26 October 1955